No. 96-1793-CFX Title: Cedar Rapids Community School District, Petitioner
v.
Garret F., a Minor By His Mother and Next Friend, Charlene F.

Docketed:
May 19, 1997 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	May 8 1997	Petition for writ of certiorari filed. (Response due June 18, 1997)
	Jun 18 1997	Brief of respondent Garret F. in opposition filed.
	Jul 2 1997	DISTRIBUTED. September 29, 1997
	Oct 6 1997	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	Apr 22 1998	Brief amicus curiae of United States filed.
	Apr 22 1998	LODGING consisting of ten copies of letters submitted by the Solicitor General.
	Apr 28 1998	REDISTRIBUTED. May 14, 1998
	May 18 1998	Petition GRANTED. SET FOR ARGUMENT November 4, 1998. **********
	Jul 2 1998	Joint appendix filed.
	Jul 2 1998	Brief of petitioner Cedar Rapids Community School District filed.
	Jul 2 1998	Brief amicus curiae of National School Boards Association filed.
	Jul 27 1998	Record filed.
	Jul 28 1998	Order extending time to file brief of respondent on the merits until August 24, 1998.
	Aug 10 1998	Brief amici curiae of National Assn. of Protection and Advocacy Systems, et al. filed.
	Aug 24 1998	Brief of respondent Garret F. filed.
	Aug 24 1998	Brief amicus curiae of United States filed.
	Aug 24 1998	Brief amici curiae of American Academy of Pediatrics, et al. filed.
	Aug 24 1998	LODGING consisting of ten copies ofdocuments submitted by counsel for the respondent
	Sep 2 1998	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Sep 25 1998	CIRCULATED.
	Sep 28 1998	Reply brief of petitioner Cedar Rapids Community School District filed.
	Oct 5 1998	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 4 1998	ARGUED.

Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1996

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,

Petitioner,

vs.

GARRET F., A Minor By His Mother and Next Friend, CHARLENE F.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a school district is required to pay for continuous one-on-one nursing services for a disabled student, when the Individuals with Disabilities Education Act expressly excludes "medical services" from its mandate.

2. Whether there should be a bright-line rule that the Act's exclusion of "medical services" means only those services provided by a physician, as determined below by the United States Courts of Appeals for the Eighth Circuit, or whether other medical services are excluded from the Act, as previously determined by the United States Courts of Appeals for the Second, Sixth and Ninth Circuits.

PARTIES TO THE PROCEEDING

Petitioner, Cedar Rapids Community School District, operates schools in Cedar Rapids, Iowa and is recognized as a school corporation under Iowa law with authority to sue and be sued, hold property, and exercise all the powers granted by law. The District was the Plaintiff in the lower court proceedings of this case and the Appellant before the United States Court of Appeals for the Eighth Circuit.

Respondent, Garret F., is a 14-year old boy whose mother and guardian is Charlene F. Garrett F. was the Defendant in the lower court proceedings of this case and the Appellee before the United States Court of Appeals for the Eighth Circuit.

There are no other parties to this action.

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The petitioner, Cedar Rapids Community School District ("the District"), respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered February 7, 1997.

OPINION BELOW

The opinion of the Eighth Circuit is reported at 106 F.3d 822, and is reproduced in the Appendix at 1a-7a.

STATEMENT OF JURISDICTION

The judgment to be reviewed was entered on February 7, 1997. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254. The district court had jurisdiction pursuant to 20 U.S.C. § 1415(e).

STATUTE INVOLVED

Title 20 U.S.C. § 1401(a) provides:

> As used in this Chapter . . .
>
> (17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be

required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

STATEMENT OF THE CASE

The District brought suit in the United States District Court for the Northern District of Iowa, seeking to overturn a decision of an Iowa administrative law judge made pursuant to 20 U.S.C. § 1400, *et seq.*[1] The decision required the District to reimburse all of Garret F.'s health care costs while attending the District's schools.

Garret F. is a 14-year-old ventilator-dependent child enrolled in the eighth grade. He attends regular education classes in his neighborhood school in Cedar Rapids, Iowa. When Garret was four, while he was riding on his father's motorcycle, he was seriously injured when his blanket caught in the drive mechanism of the motorcycle, jerking his head. Garret suffered a complete transection of the spine and, as a result, is quadriplegic and completely paralyzed below his neck. Garret depends on a ventilator for breathing. He has normal mental capacity, is able to speak, and uses a puff and sip straw to control a wheelchair.

It is undisputed that Garret requires the following health services while at school: urinary bladder catheterization (usually once a day), suctioning of his tracheostomy as needed, change of positioning, ambu bag administration in cases of ventilator malfunctioning (this consists of manual pumping of an air bag attached to his tracheostomy tube), ventilator setting checks,

1. The Individuals with Disabilities Education Act, formerly known as the Education for All Handicapped Children Act (hereinafter from time to time referred to as the "IDEA" or the "Act").

observations and assessments to determine if Garret is in respiratory distress, assessment to determine if he is experiencing autonomic hyperreflexia, and blood pressure monitoring, urinary catheterization and bowel disimpaction in the event of an episode of autonomic hyperreflexia. These services must be provided continuously by trained personnel because Garret could die if his breathing is interrupted for just a few minutes.

For every year since Garret enrolled in the District in 1988, the District has provided him with an individualized educational plan ("IEP") written by a multi-disciplinary educational team. Garret has always received instructional services in regular education classrooms. The District has also hired an educational associate to assist Garrett in moving about the building and with manipulating his District-provided computer and other instructional materials. Additionally, the District has provided Garret with special transportation; for the past several years, this has consisted of a special lift bus. Garret has been provided with specialized equipment by the District, including a computer with a mouth stick and special software.

During the first several years of Garret's enrollment in the District, the District and Garret's parents entered into an agreement that the family would provide a full-time attendant for Garret while he was at school. The family's health insurance and a trust fund established after a settlement of legal claims arising out of the motorcycle accident covered the costs of this attendant. Since 1989, this attendant has been a licensed practical nurse ("L.P.N.") who attends exclusively and continuously for Garret while at school.

In 1993, Garret F.'s mother (Charlene F.) requested that the District bear the costs of the full-time attendant required by Garret. According to the Iowa Board of Nursing, if the school

employs the attendant, the care must be provided by a licensed practitioner, either directly by a registered nurse ("R.N.") or by a licensed practical nurse ("L.P.N.") under the immediate supervision of an on-site registered nurse. Thus, Garret has received and continues to require one-on-one continuous nursing services.

The District — one of the largest in Iowa — operates approximately 33 schools for approximately 17,500 students. Approximately 2,200 of its students receive special education services. Currently, the District has the equivalent of six full-time registered nurses to serve its 17,500 students and 33 schools. No building has a registered nurse continuously on site, and the District does not provide one-on-one continuous care for any other student.

The District declined Charlene F.'s request that it pay for Garret's continuous nursing services, taking the position that the services in question were medical services which the District was not obligated to provide. The District, however, continues to provide a full-time teacher associate for Garret at an annual cost of approximately $9,548. It would cost the District approximately $37,828 (using 1994-95 costs) to provide one-on-one nursing for Garret, so the additional burden if the District must pay for Garret's intensive nursing services is approximately $28,000 per year.

Following this denial, Garret F.'s mother requested an administrative hearing pursuant to the Individuals with Disabilities Education Act. On December 16, 1994, an Iowa administrative law judge ruled that the District was required to provide for all of Garret's health needs at school including the continuous intensive nursing services he requires. Appendix C at 17a-63a. The ALJ read this Court's decision in *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883 (1984), as requiring the

District to provide, under the IDEA, any health care service that is not administered by a physician. The ALJ stated, "As much as this ALJ may disagree with the public policy of spending education funds on health services, he does not feel he has the authority to change the law." Appendix C at 51a.

The District brought this action in federal district court to review the ALJ's decision. The district court granted summary judgment for Garret F. and his mother. It ruled as a matter of law that the "medical services" exclusion in the Act "is limited to the services of a physician or hospital." Appendix B at 15a. The District appealed, and the Eighth Circuit affirmed the summary judgment in a published opinion adopting the same physician/non-physician distinction. The Eighth Circuit openly acknowledged that its ruling was in conflict with the decisions of other courts, including two other federal circuits:

> Here, Garret's services are not provided by a physician, but rather, a nurse. Thus, based on *Tatro*, the services are not medical services, but rather, school health services or supportive services, both of which meet the definition of related services which the district must provide. *See* 34 C.F.R. § 300.16(a), (b)(11) (1996).
>
> The court is aware of several decisions that have not interpreted *Tatro* as establishing a bright-line, physician/non-physician test for medical services. *See Detsel v. Board of Educ. of Auburn*, 637 F. Supp. 1022 (N.D. N.Y. 1986), *aff'd*, 820 F.2d 587 (2d Cir.), *cert. denied*, 484 U.S. 981 (1987); *Granite School Dist. v. Shannon M.*, 787 F. Supp. 1020 (D. Utah 1992); *Neely v. Rutherford*

County School, 68 F.3d 965 (6th Cir. 1995). Going beyond the physician/non-physician distinction the Supreme Court found in the statute and the regulations, these courts rely on dicta in *Tatro* in order to factor into the medical services exclusion considerations of the nature and extent of the services performed. The court declines to seize dicta in *Tatro* to go beyond the physician/non-physician test which the Supreme Court sets forth therein.

Appendix A at 6a-7a.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

In ordering the District to provide full-time one-on-one nursing services for a ventilator-dependent child, the Court of Appeals has effectively converted the IDEA from an education law to a law requiring school districts to pay catastrophic medical expenses of their students. In essence, the Eighth Circuit has relieved from responsibility those who would traditionally bear these expenses and shifted the burden onto already underfunded public school districts. This ruling can only have the effect of further eroding the ability of this nation's public schools to meet the challenge of providing a high-quality, free education to all students.

The Eighth Circuit's published ruling conflicts with the plain language of the IDEA, this Court's decision in *Tatro*, and published decisions of the Second, Sixth and Ninth Circuits. It

would have been a surprise to Congress to learn that when it enacted IDEA, and expressly *exempted* school districts from having to provide "medical services" except for "diagnostic and evaluation purposes," 20 U.S.C. § 1401(a)(17), it was really *requiring* districts to provide the intensive, continuous services that are involved in this case and are necessary to save Garret F.'s life. "Medical" services are not provided only by physicians. When this Court decided in *Irving Indep. School Dist. v. Tatro* that school districts should provide intermittent services of the kind traditionally provided by school nurses, it also indicated that school districts should not have to provide services that are "beyond the range of their competence" and have never been "part of the educational system." *Tatro*, 468 U.S. at 892-93. The services here fall well outside the range of traditional school nursing services.

The direct conflict between the Eighth Circuit's ruling and the decisions of the Second, Sixth and Ninth Circuits in *Detsel v. Board of Educ. of Auburn Enlarged City School Dist.*, 820 F.2d 587 (2d Cir.) (per curiam), *cert. denied*, 484 U.S. 981 (1987); *Neely v. Rutherford County School*, 68 F.3d 965 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1418 (1996); and *Clovis Unified School Dist. v. California Office of Admin. Hearings*, 903 F.2d 635 (9th Cir. 1990), demands this Court's immediate review. As things now stand, school districts in some states apparently must provide *any* health care service a disabled student requires (unless it has to be provided by a licensed physician), while school districts in other states need not provide such life-sustaining medical services that go well beyond the traditional role of school nurses. Given the tremendous practical and financial impact of these differences in interpretation of federal law, uniformity among the circuits is needed. Only this Court can provide it.

II.

SUMMARY OF REASONS FOR GRANTING THE WRIT.

This Court should grant the District's petition for the following reasons:

1. The Court of Appeals' ruling has created a split among the circuits and produced uncertainty on the important question of whether, under the Individuals with Disabilities Education Act, school districts must only provide educational and support services to disabled students, or whether they must provide medical services in the form of intensive, continuous nursing services as well.

2. The Court of Appeals' ruling undermines previous case law, including this Court's *Tatro* decision, which focused on whether schools had traditionally provided the services in question. This sensible rule did not require schools to assume unprecedented medical duties such as continuous, one-on-one nursing for life-threatening conditions. In light of the Court of Appeals' ruling, it is necessary and appropriate for this Court to clarify what it meant in *Tatro*.

3. The Court of Appeals' ruling will have damaging effects throughout the country. It will encourage costly litigation against school districts as parties attempt to transfer to them the high costs of medical care for the seriously disabled. Overburdened school districts throughout the country may have to redirect significant portions of their budgets to handle these catastrophic medical expenses.

III.

THE COURT OF APPEALS HAS CREATED A NEW, ILLOGICAL DEFINITION OF "MEDICAL SERVICES" WHICH CONFLICTS WITH PREVIOUS DEFINITIONS, INCLUDING THOSE OF THREE OTHER CIRCUITS.

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* serves the laudable goal of assuring that every disabled child will receive without cost "special education and related services" suitable to him or her. *Id.* § 1400(c). "Related services" are defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education . . ." *Id.* § 1401(17). The Act requires school districts to provide these services free of charge.

However, consistent with the notion that the statute is about *education*, and is not a broader law requiring school districts to meet the day-time health care needs of all students within their boundaries, the statute expressly excludes "medical services" from the definition of "related services" that must be provided by school districts. *Id.* Only medical services "for diagnostic and evaluation purposes" are mandated to be provided by school districts. *Id.*

Given this clear language, the courts have historically followed a common sense approach. They have treated certain occasional or intermittent services that were easily and historically provided by school nurses as "related services." At the same time, they have declined to require school districts to hire special one-on-one nurses to care for students with life-threatening conditions. Such care has been viewed as an uncovered "medical service."

Thus, in *Detsel v. Board of Educ. of Auburn Enlarged City School Dist.*, 820 F.2d 587, the Second Circuit held that the daily nursing required for a child who needed constant respirator assistance was a "medical service" and not a "related service" within the Act. Because of Melissa Detsel's disability, several procedures had to be performed on her regularly, including administering medication through a tube, striking her about the lungs, and suctioning out any mucus collected in the lungs. 637 F. Supp. 1022, 1024 (N.D. N.Y. 1986) (district court opinion). The attending nurse also had to be prepared to deal with Melissa's potentially life-threatening circumstances. *Id.*

The Second Circuit, expressly approving the district court's opinion, held that "[t]he extensive, therapeutic health services sought by the plaintiff on behalf of her daughter more closely resemble the medical services specifically excluded by § 1401(17) of the EAHCA [now the IDEA]." 637 F. Supp. at 1027, 820 F.2d at 588. The court noted that these were not "simple school nursing services" and that the Act "does not require the defendants school district and board of education to provide a severely physically disabled child with constant, in-school nursing care." *Id.*

Detsel is not the only decision along these lines. The Ninth Circuit followed the Second Circuit's lead in *Clovis Unified School Dist. v. California Office of Admin. Hearings*, 903 F.2d 635. In *Clovis* the parents of an emotionally disturbed child argued that her temporary hospitalization was a covered "related service" rather than an excluded "medical service." In rejecting that argument, the Ninth Circuit relied on *Detsel* and specifically held that the "medical services" exclusion did not depend on whether a licensed physician provided the service. *Id.* at 642-44.

More recently, the Sixth Circuit followed a like approach in *Neely v. Rutherford County School*, 68 F.3d 965. Samantha Neely had a rare condition which required her to breathe through a tracheostomy tube. The tube had to be suctioned and, if her breathing stopped, artificial ventilation with an ambu bag would need to be provided. Given that a nurse or medical attendant "would have had to devote virtually all of his or her attention" to Samantha, and that "such care was necessary in order to protect" the child's life, the court held that the services her parents sought were "medical" and not "related." *Id.* at 971-73.

Most district courts have concurred in this practical, flexible approach to the "medical services" exclusion. In *Granite School Dist. v. Shannon M.*, 787 F. Supp. 1020 (D. Utah 1992), the district court ruled that full-time nursing care for a child with neuromuscular atrophy and severe scoliosis was not a "related service" under the Act which the school district had to provide as part of her free and appropriate public education. The student used a tracheostomy tube which required constant attention; the court reasoned that this constant care could not be provided by the school district's three existing nurses, and that "the Act does not require Granite to provide Shannon with full-time nursing/tracheostomy care as a supportive service." 787 F. Supp. at 1030.

Likewise, a federal district court decided in *Fulginiti v. Roxbury Tp. Public Schools*, 921 F. Supp. 1320 (D.N.J. 1996), that ongoing nursing services for a child with dysfunction of her nervous system were an uncovered "medical service." Carissa Fulginiti had a tracheostomy tube that required monitoring and suctioning during the school day. The court found that "the care required for Carissa is medical in nature and that to provide it would be unduly burdensome upon the District." *Id.* at 1325. *Accord Bevin H. by Michael H. v. Wright*, 666 F. Supp. 71, 74-76 (W.D. Pa. 1987) ("related services" do not include one-on-one nursing to care for a disabled student with a tracheostomy).

In *Ellison v. Bd. of Educ. of Three Village Central School Dist.*, 597 N.Y.S. 2d 483 (App. Div. 1993), a New York appellate court considered a claim brought on behalf of a child who, like Garret, was quadriplegic and ventilator-dependent. The court held that the one-on-one nursing services required by this child were not "simple school nursing services" but, rather, were excluded medical services. *Id.* at 485.

There are shades of difference in the reasoning of these opinions. Some focus on the school's financial burden. Others emphasize the legal burden of being responsible for continuous, life-sustaining care. Still others highlight the gap between the services sought by the disabled child's parents and the "school nursing services" traditionally provided by schools. But the common thread running through all these decisions is their conclusion — as a matter of law — that Congress did not intend to require school districts to provide continuous one-on-one nursing services. All have treated intensive nursing services as an excluded "medical service."

The Eighth Circuit's ruling in this case shatters this consensus. In its brief published opinion, the Court of Appeals announced a "bright-line, physician/non-physician test" for medical services. The Court of Appeals reasoned simplistically that "medical" means "delivered by a physician." Because Garret's continuous nursing care (like the continuous care in all the above cited decisions) does not require a physician, the Court of Appeals held the District must provide it. The Court of Appeals freely acknowledged that its decision was at odds with other federal appellate and district court rulings. Appendix A at 6a-7a.

The only previous reported federal decision that had adopted the Eighth Circuit's bright-line physician/non-physician standard was *Macomb County Intermediate School Dist. v. Joshua S.*,

715 F. Supp. 824 (E.D. Mich. 1989). Although *Joshua S.* did not involve continuous nursing care, the court stated in dictum "that the medical services exclusion is limited to services provided by a licensed physician." *Id.* at 828. However, *Joshua S.* lacks any serious precedential value because the Sixth Circuit's *Neely* decision effectively overruled it.

The Eighth Circuit's decision, which *has* precedential value and is binding in a seven-state area, thus throws this area of law into a vortex of uncertainty. Do schools have to provide continuous nursing services or other intensive health care-related services to seriously disabled students? The question now has no clear answer. Apparently they must provide these costly services within the Eighth Circuit; they do not have to provide them within the Second, Sixth and Ninth Circuits; and uncertainty prevails elsewhere. Because of the number of children who have serious medical disabilities requiring one-on-one nursing services, school districts in some parts of the country are now subject to much heavier potential financial burdens than school districts in other parts of the country. Given the importance of these questions to school districts, disabled students, their families, practicing lawyers and the judges who decide these cases, this Court should step in and bring clarity to this important area of law.

IV.

THE COURT OF APPEALS' RULING UNDERMINES THIS COURT'S *TATRO* DECISION, AND HAS SPAWNED UNCERTAINTY AS TO WHAT *TATRO* MEANS, REQUIRING THIS COURT'S INTERVENTION.

The Eighth Circuit's ruling conflicts with two previous decisions of this Court interpreting the IDEA. Indeed, because the Court of Appeals' opinion purports to *follow* one of those

decisions (*Tatro*), while really *undermining* it, it has great potential for creating mischief in this area of law.

In the landmark case of *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982), the Court's first decision under the Act, this Court considered whether school districts had to provide every educational service that was needed to give a disabled child an opportunity "commensurate with the opportunity provided other children." *Id.* at 186 (quoting district court). The complaining parents sought to require the school district to provide a qualified sign-language interpreter for their partially deaf child. Although the child was already receiving some specialized services at school, the parents argued that she would perform better with an interpreter and that one was needed to equalize their daughter's opportunities with those of nondisabled children. *Id.* at 185-86.

The Court rejected this argument. To the contrary, it held that the Act did not require any particular level of educational benefits. *Id.* at 202-03. The Court expressly rejected the notion that school districts were obligated by the Act to "maximize each child's potential," regardless of burden or cost. *Id.* n. 26. Instead, each case had to weighed individually. *Id.* at 208-10.

The Eighth Circuit's embrace of bright-line rules cannot be squared with *Rowley*'s rejection of them. If the Act adopts an overall reasonableness approach, as *Rowley* held, then a requirement that school districts provide any nursing service regardless of burden or cost cannot stand.

The Eighth Circuit's ruling conflicts even more directly with this Court's 13-year-old *Tatro* precedent, its only prior decision addressing the "related services" exclusion. As noted, because the Court of Appeals purports to be reaching an outcome dictated by *Tatro*, the consequences of its misreading of *Tatro* could be very far-reaching.

In *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883, this Court considered a claim brought on behalf of a school-age child with spina bifida who needed clean intermittent catheterization ("CIC") every three or four hours. The CIC procedure, according to the Court, was "a simple one that can be performed in a few minutes by a layperson with less than an hour's training." *Id.* at 885. It was undisputed that state law did not require a nurse to perform this simple procedure. *Id.* at 887.

Under these circumstances, the Court held that the school district should provide the service. The Court's reasoning had two components:

(1) CIC is analogous to the type of service that school nurses have traditionally provided to non-disabled students — *i.e.*, "services of a kind that are routinely provided to the non-handicapped" (*id.* at 893-94);

(2) while one could conclude that Congress wanted "to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence . . ." it was also logical to conclude that "Congress intended to impose the obligation [on schools] to provide school nursing services" (*id.* at 892-93).

In short, this Court found that CIC, a simple procedure that would only need to be performed once or at most twice during the school day, was a "related" service analogous to traditional school nursing services (like administering insulin shots for a diabetic child) and not an excluded "medical service."

As in *Rowley*, this Court in *Tatro* followed a balanced, nuanced approach, carefully considering the burdens on the school district. *Id.* at 893-94. Thus, until the Court of Appeals' decision in this case, most lower courts had *not* read *Tatro* as

establishing a bright-line rule that "medical services" meant "physician services." As the Ninth Circuit explained in Clovis, "[T]he Court [in *Tatro*] held only that services which *must* be provided by a licensed physician, other than those which are diagnostic or evaluative, *are* excluded and that school nursing services of a simple nature are not excluded." *Clovis*, 903 F.2d at 635 (emphasis in original). *Accord Neely*, 68 F.3d at 971 ("We believe the better interpretation of *Tatro* to be that a school district is not required to provide every service which is 'medical in nature.' "); *Detsel*, 820 F.2d at 588, 637 F. Supp. at 1026-27; *Shannon M.*, 787 F. Supp. at 1027. These readings of *Tatro* were not seriously questioned until the Eighth Circuit's decision in this case.

Indeed, the Office of Special Education Programs (OSEP) of the United States Department of Education, which administers the IDEA, recently authored an interpretive letter that disavowed a bright-line test. The OSEP indicated that, under its view of *Tatro* and the lower-court precedents, a "case-by-case" approach should be followed in determining whether one-to-one nursing services must be provided by schools. Letter from Thomas Hehir to John Anderson, 24 IDELR 180 (February 22, 1996); Appendix D at 64a-67a.

The Eighth Circuit, however, reads *Tatro* in a dramatically different way. According to the Court of Appeals, this Court

> established a bright-line test: the services of a physician . . . are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not.

Appendix A at 6a. The Eighth Circuit implied that it might not "agree with this reading of the statute," but added, "[W]e are bound by the Supreme Court's holding." *Id.*

Thus, there is no longer *the law* laid down by this Court. There are, instead, two different versions of that law depending on what circuit one is in. Does the Act create a mechanical test: "medical" equals "physician"? Only this Court can resolve the controversy concerning the meaning of the Act and its own opinions.

V.

THE COURT OF APPEALS' RULING HAS ADVERSE POLICY CONSEQUENCES TRANSCENDING ITS NEGATIVE IMPACT ON THIS AREA OF LAW.

The Eighth Circuit's decision does not just make bad law; it makes even worse policy. We enumerate just a few of the adverse consequences.

First, it places school districts in the position of having to bear a host of catastrophic medical expenses. Typical annual per-student estimates of the cost of providing one-on-one nursing range from $28,000 (this case), to $25,000 to $40,000 (*Ellison*, 597 N.Y.S. 2d at 485), to $30,000 (*Shannon M.*, 787 F. Supp. at 1029), to $56,000 (*Fulginiti*, 921 F. Supp. at 1325). Multiplied by the number of seriously disabled children, the costs are staggering. Particularly when, as here, other sources of funding are potentially available, it makes no sense to force school districts with their tight budgets and limited sources of financing to bear these non-educational costs.

Second, the Eighth Circuit's opinion would take schools out of the traditional roles they have played. Continuous, intensive, one-on-one nursing is not a historic function of our public schools. As Congress found, schools should not be "asked to do what they are not intended to do." H. Rep. No. 101-544 at 11, House Committee on Education and Labor, 101st Cong.,

2nd Sess., *reprinted in* U.S. Cong. Code & Admin. News 1723 at 1733 (1990).

Third, the Eighth Circuit's ruling raises significant concerns of state sovereignty and states' rights. In *Virginia Dept. of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc), the Fourth Circuit en banc held that Virginia schools could not be required under the IDEA to provide educational services to disabled students who were suspended or expelled for reasons unrelated to their disabilities. The court concluded that unless Congress had expressed its intent in "unmistakably clear terms," which it had not, states should not be required to provide disabled children with more than "access to education," *i.e.*, the same educational rights that nondisabled children receive. *Id.* at 566-68. The court added that it would raise a serious constitutional question if the IDEA were interpreted as curtailing the traditional ability that states have to control discipline in their own classrooms. *Id.* at 569-72. By the same token, the Eighth Circuit's interpretation of the IDEA as requiring local school districts to provide continuous intensive nursing services that are not educational in nature and that bear no relation to services historically provided by schools raises similar federalism concerns.

Finally, while uncertainty in the law is rarely a good thing, it is especially undesirable when the parties are school districts, disabled children, and their parents. The "medical services" exclusion is not an abstract point of law that will only emerge occasionally as a real dispute. *Every* disabled child must have an Individualized Education Plan, and the issue of who must pay for nursing or other non-physician medical services will arise again and again in IEP's. Given the personal feelings and human emotions involved, it benefits no one for the law to be unsettled.

CONCLUSION

For all the above reasons, the District respectfully requests that this Court grant its petition for writ of certiorari and direct the Court of Appeals below to certify the record in this case to this Court and thereby review the judgment and opinion of the Court of Appeals below.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED FEBRUARY 7, 1997

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-1987 NICR

Cedar Rapids Community School District,

Appellant,

v.

Garret F., A minor by his Mother and Next friend, Charlene F.,

Appellee.

Appeal from the United States District Court for the Northern District of Iowa

Submitted: December 12, 1996

Filed: February 7, 1997

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and STROM,* Senior District Judge.

STROM, District Judge.

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* The Honorable Lyle E. Strom, United States Senior District Judge for the District of Nebraska, sitting by designation.

Appendix A

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 - 1491o. At issue is whether the IDEA requires the Cedar Rapids Community School District to provide Garret F. with continuous nursing services while he is in school. The district court[1] granted summary judgment in favor of Garret finding that the necessary services were not within the "medical services" exclusion of the IDEA, and therefore, were "related services" which the school district must provide.

FACTS

In 1987, when he was four years old, Garret was severely injured in a tragic motorcycle accident. While Garret's mental abilities were unaffected, his spinal cord injury left him a quadriplegic and ventilator dependent.

In the fall of 1988, Garret started kindergarten in the Cedar Rapids Community School District. He has been in school there ever since. During the school day, Garret requires a personal attendant within hearing distance of him at all times to see to his health care needs. Garret requires urinary bladder catheterization about once a day, suctioning of his tracheostomy as needed, food and drink on a regular schedule, repositioning, ambu bag administration if the ventilator malfunctions, ventilator setting checks, observation for respiratory distress or autonomic hyperreflexia, blood pressure monitoring, and bowel disimpactation in cases of autonomic hyperreflexia. From kindergarten through the fourth grade, pursuant to an agreement

1. Hon. Edward J. McManus, United States District Court Judge for the Northern District of Iowa, Cedar Rapids Division.

Appendix A

between Garret's parents and the school district, Garret's family provided the personal attendant.[2]

However, in 1993, when Garret started fifth grade, the agreement between his parents and the school district was discontinued. Garret's mother, Charlene F., requested that the school district provide Garret's nursing services while he was at school. The school district refused stating that it was not obligated to provide continuous, one-on-one nursing services.

Relying on the IDEA and the Iowa special education laws, Charlene administratively challenged the school district's position. After a hearing, the administrative law judge concluded that the school district had to reimburse Charlene for the nursing costs she incurred during the 1993-94 school year and had to provide such services in the future. The school district appealed to United States District Court.

In district court, both parties filed motions for summary judgment based on the record from the administrative hearing. The court granted summary judgment in favor of Garret finding that the services were not within the scope of the "medical services" exclusion of the IDEA, and therefore, the school district was required to provide them as "related services." The school district appealed.

2. In kindergarten, Garret's aunt, who was not a registered nurse (RN) or a licensed practical nurse (LPN) and did not have formal training in medical services, performed these services. From first through fourth grades, an LPN performed the services.

Garret's family sees to his health care needs when Garret is at home after school and on weekends. On weeknights, an LPN is present to check on Garret every two hours as he sleeps.

Appendix A

STANDARD OF REVIEW

The court will review the district court's interpretation of the applicable federal statutes de novo on appeal. *Dell v. Board of Educ.*, 32 F.3d 1053, 1058 (7th Cir. 1994).

DISCUSSION

In order to receive funds under the IDEA, a state must demonstrate to the Secretary of Education that it has "in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(1) (Supp. 1996). The phrase "free appropriate public education" is defined as special education and related services. 20 U.S.C. § 1401(18) (1990).[3] Thus, if Garret's nursing services qualify as "related services," the school district must provide them.

---

3. The full definition is:

> special education and related services that —
>
> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
>
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. 1401(a)(18) (1990).

Appendix A

Related services are statutorily defined as:

> transportation, and such developmental, corrective, and **other supportive services (including** speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and **medical services, except that such medical services shall be for diagnostic and evaluation purposes only)** as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(a)(17) (Supp. 1996) (emphasis added). Garret contends that his nursing services qualify as related services, but the school district argues that the services are "medical services" which are expressly excluded from the definition of supportive services and consequently the definition of related services.

This court's decision is controlled by the two step test pronounced by the Supreme Court in *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883 (1984). To determine if a service is a related service under the IDEA, the court must first determine whether the service is a "supportive service[] . . . required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(17) (1990); *Tatro*, 468 U.S. at 890. If it is, then the court must determine if the service is excluded from

the definition of supportive service as a medical service beyond diagnosis or evaluation. *Tatro,* 468 U.S. at 890.

There is little argument about whether the services Garret requires qualify as supportive services necessary to enable him to enjoy the benefit of special education. If the services are not available during the school day, Garret cannot attend school and thereby benefit from special education. "Services . . . that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the building" which are expressly provided for in the IDEA. *Id.* at 891. Thus, the court finds that the services Garret requires at school are supportive services.

At the second step, the court must determine whether the services are excluded from the definition of supportive services as medical services beyond diagnosis and evaluation. In *Tatro,* the Supreme Court established a bright-line test: the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not. *See Tatro,* 468 U.S. at 891-95. Regardless of whether we agree with this reading of the statute and the regulations, we are bound by the Supreme Court's holding.

Here, Garret's services are not provided by a physician, but rather, a nurse. Thus, based on *Tatro*, the services are not medical services, but rather, school health services or supportive services, both of which meet the definition of related services which the district must provide. *See* 34 C.F.R. § 300.16(a), (b)(11) (1996).

The court is aware of several decisions that have not interpreted *Tatro* as establishing a bright-line, physician/non-

physician test for medical services. *See Detzel v. Board of Educ. of Auburn,* 637 F. Supp. 1022 (N.D.N.Y. 1986), *aff'd,* 820 F.2d 587 (2d Cir. 1987), *cert. denied,* 484 U.S. 981 (1987); *Granite School Dist. v. Shannon M.,* 787 F. Supp. 1020 (D. Utah 1992); *Neely v. Rutherford County School,* 68 F.3d 965 (6th Cir. 1995). Going beyond the physician/non-physician distinction the Supreme Court found in the statute and the regulations, these courts rely on dicta in *Tatro* in order to factor into the medical services exclusion considerations of the nature and extent of the services performed. The court declines to seize dicta in *Tatro* to go beyond the physician/non-physician test which the Supreme Court sets forth therein.

Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CEDAR RAPIDS DIVISION FILED MARCH 22, 1996

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

No. C95-5

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,

Plaintiff,

vs.

GARRET F., a minor, by his mother and next friend, CHARLENE F.,

Defendant.

ORDER

This matter is before the court on plaintiff's resisted Motion for Summary Judgment, filed October 30, 1995, and on defendant's unresisted Motion for Summary Judgment, filed December 8, 1995.[1] Plaintiff's motion denied, defendant's motion granted.

---

1. While plaintiff has not resisted defendant's motion, and therefore defendant's motion is technically unresisted, the parties' motions for summary judgment are cross motions on the same legal issues, and therefore the court will not rely upon LR 14.f. in granting defendant's motion.

Appendix B

Plaintiff brings this action seeking judicial review of a final decision of an Administrative Law Judge (ALJ) appointed by the Iowa Department of Education. Plaintiff seeks declaratory relief that it is not required under either the Individuals With Disabilities Education Act (IDEA), 20 USC § 1401 et seq., or the Iowa Special Education laws, IC § 256B, to provide certain health care services to defendant. The court has jurisdiction pursuant to 20 USC §§ 1415(e)(4) and 1367.

At the time of the filing of the Complaint, defendant Garret was a 12 year old sixth grade student. Following an injury in 1987, Garret is quadriplegic and ventilator dependent, and requires certain health care supervision. As characterized by the ALJ (and the parties here), the issue is whether Garret's family is responsible for providing certain health care services during school hours to enable Garret to attend public school, or whether the necessary health care services must be provided during school hours at no cost to Garret as part of a free appropriate public education.

A "free appropriate public education" is defined as "special education and related services." 20 USC § 1401(a)(18). "Related services" are defined as

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from

> special education, and includes the early identification and assessment of handicapping conditions in children.

20 USC § 1401(a)(17).

On December 16, 1994, the ALJ found that Garret was a special education student under the IDEA, and further found that the health care services required by Garret were "related services" (and not excluded "medical services") under 20 USC § 1401(a)(17), and "supporting services" under the Iowa Special Education law, IC § 256B, and therefore defendant was required to provide the services under either state or federal law.

Plaintiff asserts that the services required by Garret are neither "related services" which it is obligated to provide under 20 USC § 1401 (a) (17), nor "supporting services" under IC § 256B. Instead, plaintiff asserts that the services are "medical services" which are excluded from the definition of "related services" by 20 USC § 1401(a)(17). Additionally, plaintiff asserts that the services are not "supporting services" under Iowa law. In support, plaintiff urges that the Iowa law mirrors the requirements of federal law, and if the services are not required under federal law, then they are not required under Iowa law. Plaintiff seeks a ruling that it is not required to provide health care services under either the IDEA or the Iowa Special Education law.

> Fed. R. Civ. P. 56(c) provides that summary judgment shall be entered if the "pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is not a

> genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In deciding whether to grant a motion for summary judgment, the district court must view the evidence in favor of the party opposing the motion and give him the benefit of all reasonable inferences. *Kegel v Runnels*, 793 F.2d 924, 926 (8th Cir. 1986). However, parties opposing a summary judgment motion may not rest merely upon the allegations in their pleadings. *Buford v Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984). The opposing parties must resist the motion by setting forth specific facts showing that there is a genuine issue of material fact for trial. *Id.*, (citing Fed. R. Civ. P. 56(e) and *Burst v. Adolph Coors Co.*, 650 F.2d 930, 932 (8th Cir. 1981)).

Green v St. Louis Housing Authority, 911 F.2d 65, 68 (8th Cir. 1990).

At issue is the scope of the "medical services" exclusion to the Individuals with Disabilities Education Act (IDEA), 20 USC § 1401(a)(17). In plaintiff's brief and statement of facts, plaintiff asserts that Garret requires transportation, occupational therapy consultative services, equipment, a one-on-one teacher associate to assist with education and mobility, and health services including urinary bladder catheterization (usually once per school day), suctioning of his tracheostomy as needed, food and drink on a regular schedule, change of positioning, ambu bag administration in case of ventilator malfunctioning, ventilator setting checks, observations to determine if he is in respiratory

distress or autonomic hyperreflexia, blood pressure monitoring, and disimpaction in the event of an episode of autonomic hyperreflexia. A person trained to provide these services must be within hearing distance of Garret at all times. In response to plaintiff's inquiry as to how Garret's care must be provided, the Iowa Board of Nursing issued a Declaratory Ruling, which provides in part:

> because of [Garret's] need for continuous monitoring and assessment, the complexity of the care required, the degree of nursing judgment required, the life-threatening aspect of inadequate care, and the need for the care provider to master many competencies, . . . the care of [Garret] may not be delegated by a school nurse employed by [plaintiff] to nonlicensed personnel who would perform the procedures at school when a licensed registered nurse is not in the same building.

Garret maintains that his needs are not as extensive as suggested by plaintiff, however, under either party's version, Garret's school needs may be satisfied without the services of a physician.

As noted above, the ALJ determined that Garret's needs were not within the medical services exclusion, and that under either Iowa or federal law, they must be provided by plaintiff, at plaintiff's expense. In so doing, and in reliance upon *Irving Independent School District v. Tatro*, 468 US 883 (1984), the ALJ found that a "medical service" is a service that must be performed by a physician, and that Garret's necessary services were therefore not within the scope of that exclusion.

Beginning with the standard of review, 20 USC 1415(e)(2) provides that

> in any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate.

The issue in the *Tatro* case, *supra*, was whether clean intermittent catheterization (CIC), a procedure involving the insertion of a catheter into the urethra to drain the bladder, was a "related service" that the school was obliged to provide to the student. In holding that CIC was such a related service, and was not an excluded "medical service," the Court stated:

> We begin with the regulations of the Department of Education, which are entitled to deference. See, e.g., Blum v. Bacon, 457 U.S. 132, 141, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728 (1982). The regulations define "related services" for handicapped children to include "school health services," 34 CFR § 300.13(a) (1983), which are defined in turn as "services provided by a qualified school nurse or other qualified person," § 300.13(b)(10). "Medical services" are defined as "services provided by a licensed physician." 300.13(b)(4). Thus, the Secretary has determined that the services of a school nurse otherwise qualifying as a "related

service" are not subject to exclusion as a "medical service," but that the services of a physician are excludable as such.

This definition of "medical services" is a reasonable interpretation of congressional intent. Although Congress devoted little discussion to the "medical services" exclusion, the Secretary could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence. From this understanding of congressional purpose, the Secretary could reasonably have concluded that Congress intended to impose the obligation to provide school nursing services.

Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as "trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel." S.Rep. No. 94-168, supra, at 33, U.S.Code Cong. & Admin.News 1975, p. 1457. School nurses have long been a part of the educational system, and the Secretary could therefore reasonably conclude that school nursing services are not the sort of burden that Congress intended to exclude as a "medical service." By limiting the "medical services"

exclusion to the services of a physician or hospital, both far more expensive, the Secretary has given a permissible construction to the provision.

Tatro, supra, 468 US at 891-893 (footnotes omitted).

As noted above, accepting the most comprehensive allegations as to services required by Garret, it is undisputed that the services can be provided by a school nurse. The *Tatro* Court used precision in noting that the "medical services" exclusion is limited to the services of a physician or hospital. In accordance with the appropriate standards, in light of *Tatro*, and for the reasons set forth in the ALJ's thorough decision, plaintiff's Motion for Summary Judgment will be denied, and defendant's cross-motion for summary judgment will be granted. *But see, e.g., Neely v. Rutherford County School*, 68 F3d 965 (6th Cir. 1995) (holding that court must weigh risk, liability, and burden of providing service, and that *Tatro* does not establish a "bright-line" rule that any medical service which can be performed by someone other than a licensed physician falls outside scope of "medical services" exception).

Due to the court's disposition of this matter, the court need not address the issue of state law requirements. The parties having fully developed their positions in their briefs, oral argument is unnecessary.

It is therefore

ORDERED

Plaintiff's Motion for Summary Judgment denied, defendant's Motion for Summary Judgment granted.

Appendix B

March 22, 1996.

s/ Edward McManus
Edward McManus, Judge
UNITED STATES DISTRICT COURT

APPENDIX C — DECISION OF THE ADMINISTRATIVE LAW JUDGE DATED DECEMBER 16, 1994

DEPARTMENT OF EDUCATION

Admin. Doc. SE-98

In re Garret F.

Charlene F.,

Appellant

vs.

Cedar Rapids Community School District, and

Grant Wood Area Education Agency 10

Appellees

DECISION

The above entitled matter was heard on October 31, 1994, before Administrative Law Judge (ALJ) Larry Bartlett. With agreement of the parties, the hearing was recessed until November 1, and later until November 14. The hearing was concluded on November 14. The parties mutually agreed on December 2 as the date to have briefs postmarked. Briefs were received by the ALJ on December 5.

The Appellant was represented by Attorney Douglas Oelschlaeger, and the Cedar Rapids Community School District (District) was represented by Attorney Sue Seitz. The Executive

Appendix C

Director of Special Education from Grant Wood Area Education Agency 10 (AEA), Paula Vincent, was present on behalf of the AEA, but the AEA was not represented by legal counsel.

The hearing was held pursuant to the authority of Section 256B.6, The Code of Iowa, and was conducted pursuant to the terms of Chapter 281-41, Iowa Administrative Code. The hearing was open to the public at the request of Appellant. The witnesses were sequestered upon motion of the Appellant. Garret was in attendance on the third day of hearing.

The record was kept open at the end of the hearing for the purpose of receiving a full and certified copy of a Declaratory Ruling of the Iowa Board of Nursing. That copy was received on December 5.

On or about October 12, 1993, the Appellant filed an affidavit of appeal regarding her son, Garret. (The affidavit was first sent by telephonic facsimile on October 8, 1993). In it, the Appellant challenged the District's refusal to provide Garret with a health care provider to "assist Garret with physical needs during the school day." The hearing of the appeal was delayed on numerous occasions at the request of the parties, who attempted to find a mutually satisfactory resolution to the dispute.

At the conclusion of the hearing, this ALJ announced that his goal for completion of a decision would be five working days following his receipt of the briefs. The extensive record and important legal issues involved resulted in that time estimate being off the mark by about one week. For this he apologizes.

Appendix C

Finding of Fact

The ALJ finds that he and the Department of Education have jurisdiction over the parties and subject matter involved in this proceeding.

The facts are largely undisputed.

Garret F. is a twelve-year-old boy who lives with his divorced mother and older brother in the District. Garret's father resides in the general community area, and Garret visits his father's home every other weekend. Garret has attended school in the District since kindergarten and is currently a sixth-grade student. He attends a typical middle school program at Roosevelt School. He appears to be friendly, creative, above-average in ability and is considered academically successful in school. His most recently received grade report included one C, one B-plus, and the rest were A's. Garret receives no specially designed instruction. He does receive a number of support services.

When Garret was four years old, he was injured in an unusual motorcycle accident. While riding on the rear seat of a motorcycle, a blanket Garret had with him became entangled in the drive mechanism of the cycle, suddenly jerking his head and causing injury to his spinal column. He has since been paralyzed from his neck down. He is wheelchair bound and is ventilator dependent. He does have complete head movement, is able to speak, and controls his motorized wheelchair through use of a puff and suck straw. Being ventilator dependent means that he breathes only with external aids, usually an electric ventilator, and occasionally by someone else's manual pumping of an air bag attached to his tracheotomy tube when the ventilator is being maintained. This later procedure is called ambu bagging.

While in school, Garret needs a responsible person in his vicinity to attend to his personal needs. He needs assistance with urinary bladder catheterization once a day, the suctioning of his tracheotomy tube as needed, but at least once every six hours, with food and drink at lunchtime, in getting into a reclining position for five minutes of each hour, and ambu bagging occasionally as needed when the ventilator is checked for proper functioning. He also needs assistance from someone familiar with his ventilator in the event there is a malfunction or electrical problem, and someone who can perform emergency procedures in the event he experiences autonomic hyperreflexia. Autonemic hyperreflexia is an uncontrolled visceral reaction to anxiety or a full bladder. Blood pressure increases, heart rate increases, and flushing and sweating may occur. Garret has not experienced autonomic hyperreflexia frequently in recent years, and it has usually been alleviated by catheterization. He has not ever experienced autonomic hyperreflexia at school. Garret is capable of communicating his needs orally or in another fashion so long as he has not been rendered unable to do so by an extended lack of oxygen.

It is disputed as to whether a registered nurse licensed by the state (RN), a licensed practical nurse (LPN), or a skilled and trained care provider is required, or necessary, as the responsible person to be in Garret's proximity while he attends school. It is also disputed as to who is responsible for providing or paying for this person's services.

At first, health care at school was provided through health insurance obtained through Garret's father's employment. At some later time, however, the maximum payment limit was reached and the insurance coverage ceased. Garret's mother has since been able to obtain insurance coverage through a special

program for which she pays an annual premium of $1,183. However, its annual coverage limit for health care is normally exceeded by mid-year. Health care assistance the remainder of the calendar year, including the first part of each new school year in the fall, is provided as a result of money placed in a trust fund for Garret's support that was established following his accident. The current cost of health care to Garret's family is $22.00 per hour ($18.50 for 1993-94), including the seven-hour school day when school is in session.

Health care is provided Garret at home and school for a total of about 16 hours a day during the week. (This includes school time on school days.) No professional health care provider is employed in Garret's care on weekends. Care between school-time and 11:00 p.m. weekdays and on weekends is provided by Garret's family and friends. His friends are familiar with his needs and his ventilator management. A health care provider is in the home during the week-night sleeping hours to attend to Garret's needs, including being turned in his sleep every two hours, and to allow the family undisturbed sleep time. Garret's pediatrician testified that he has certified the need of licensed nursing services for purposes of insurance coverage. Garret's mother testified that she would hire a nonlicensed trained health care provider at a lower cost if the insurance company would allow it.

At the current time, professional health care is provided by three LPNs employed and provided by a local health care agency. The LPNs are supervised by RNs employed by the agency. A RN visits the home about two times per year in a supervisory capacity. Even though insurance pays for care only for the first half of the year, Garret's mother testified that it is impractical to not maintain the same health care year around.

The pediatrician that has attended Garret since his accident testified about Garret's medical needs. In 1989, when Garret returned to school following his accident, the physician provided the school with detailed suggestions and recommendations for his care at school. He listed eight competencies necessary to the person or persons to have in caring for Garret at school. He testified that a health care provider or nurse's aid could be trained in or taught all of the competencies. The record indicated that Rns and LPNs also needed to be trained on Garret's specific equipment. According to the doctor, none of the eight competencies required the training or experience of a physician.

As a result of a change in procedures for dealing with the health needs of students with disabilities initiated by the Department of Education, in the summer of 1993 the District undertook a detailed assessment of Garret's health care needs while at school. The District requested and obtained a physical examination, health status report, and responses from the pediatrician to specific health related questions. In response to the question of training or skills needed by the person providing health care to Garret, the pediatrician partially responded:

> "I would think a minimum degree of LPN or a skilled care provider who has demonstrated the competencies as directed in the 1988 letter would be necessary to adequately and safely perform the above procedures."

In the fall of 1993, the physician was asked by the District to respond in writing to additional clarifying questions about Garret's health care needs at school. Nothing that was provided in the way of additional information from the physician indicated that he had changed his opinion that an LPN or trained and

skilled health care provider could provide adequate and appropriate care to Garret while at school. He did state in response to questions from the ALJ during testimony that an LPN, or trained and skilled health care provider, did need general supervision from a RN or a physician, but the supervisor did not have to be on-site so long as contact with the supervisor was available within 10 to 15 minutes.

For Garret's first year in school (1988-89), his health care services were performed by his aunt, who was 18-years-old at the beginning of the school year. The aunt had no formal training in medical services and was not an LPN or RN. She apparently learned by experience during time she spent with the family in the hospital and at home. Garret's physician was aware that the aunt would provide the services, and he had no objection.

Garret has never needed emergency care at school. The LPNs keep a daily log of health care of Garret at school for sharing with Garret's mother.

Garret's mother testified that she first sought District payment for health care services in the summer of 1988 before Garret started his first year of school. She stated that she had brought up the subject several times since. The most recent request was in March, 1993, when she orally asked a District administrator whether the District would pay for the health care provider. In June, 1993, Garret's mother had not received a response, and telephoned the District Director of Special Services. The Director responded by letter dated June 7 that the matter was being referred to the District's legal counsel. In a subsequent letter dated June 17, the Director notified Garret's mother that the District needed additional medical information so that the District could comply with new Department of

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Education rules regarding provision of special health services (281-41.21-.23 I.A.C.). He stated in the letter that once the information was provided, a meeting would be held to prepare a health care plan for Garret.

By letter dated July 28, 1993, Garret's mother expressly requested District payment of health care service cost while Garret was at school. She cited legal authority on the point that such service provision was required by law. By letter dated August 3, the District's Director again requested detailed health information on Garret.

In response to the August 3 letter, Garret's mother and physician responded to a number of questions. The materials provided the District in that letter stated that Garret's health has been quite good. It stated that he required urinary bladder catheterization as needed, normally once a day during school hours. Suctioning (cleaning) of his tracheostomy on an as-needed basis, and assistance with food and drink. The only emergency situation foreseen was a potential problem with the ventilator, airway obstruction, or respiratory infection. His ventilation could be supported temporarily by ambu bagging while problems with the ventilator were investigated. Garret's ventilator has an alarm system which provides a loud report when air pressure is low due to a leak, or when plugged and suctioning is needed. A low battery is also reported through an alarm. Garret's mother testified that she recently used the ambu bag for Garret's breathing during a highway trip from Cedar Rapids to Denver, Colorado with no apparent consequence.

A meeting between Garret's mother and District staff to discuss his health care needs and to develop an individual health care plan (IHP) was scheduled for September 2, 1993. School

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started August 30, but District staff conflicts resulting from preparations for the opening of school resulted in the meeting not being scheduled earlier. On September 1, Garret's mother requested postponement of the meeting so that she might be better prepared. She also stated that she would seek the help of an attorney since the District had advised her that the District's attorney might be present at the meeting.

A meeting to develop an IHP was held on September 10. Garret's mother was accompanied by a parent advocate. About 13 to 14 persons were present, including two of the District's school nurses and the District's Manager of health Services, who is an experienced nurse. An individualized education program (IEP) was developed which provided only for the services of an occupational therapist on a consultative basis of 60 minutes per semester. Attached to and made part of the IEP was the IHP developed at the same meeting primarily by the District's nursing staff present with input from Garret's mother. Garret's pediatrician was not present. After outlining Garret's specific health care needs, the IHP concluded that because Garret "requires continuous monitoring and assessment: highly technical and extensive nature of care, life threatening prospect of inadequate care, mastery of numerous competencies," Garret needed "continuous care by an appropriate licensed practitioner." The level of supervision required was considered to be "In school setting-registered nurse." District staff concluded orally at that meeting that the items in the IHP were medical services rather than health care services, and thus, were not the responsibility of the District to provide. This position was reiterated in a letter dated September 13 from the District Director of Special Services to Garret's mother.

In a six-page dissenting opinion dated September 20,

Garret's mother outlined the reasons for her disagreement with decisions on the IHP. She stated that, except for tracheostomy obstructions blocking his air source, Garret was capable of and able to advise a care provider of his needs and the manner in which they should be met. She pointed out that Garret's presence in the classroom had been "remarkably, uneventful," and "non-disturbing to the regular education environment," while providing Garret with a positive physical, social, and healthy setting. She complained that inadequate attention had been given to Garret's physician's recommendations about the training needed for a person to care for Garret while at school. She reminded the District that his health care needs were met during the 1988-89 school year by a "properly-trained non-licensed care provider," and from 1989-1993 by a properly trained LPN. She suggested that some of the care items (e.g., skin) in the IHP were no longer needed, or should be modified.

In response to the dissent, the AEA Executive Director of Special Education conducted an investigation of the situation. She found, as documented on October 28, that the parties continued to be interested in resolving the situation and were willing to explore alternative possibilities. The District was willing to consider employing a non-licensed health provider for Garret while at school, but was concerned with a conflict with the standards of the State Board of Nursing. Obtaining a waiver of licensed nursing services from the Department of Human services was explored, but was not feasible because the family income exceeded established guidelines. Continued efforts at a mutually satisfactory resolution was encouraged, but no specific decision with regard to the dissent was rendered.

The District does provide a number of services and special equipment for Garret, but except for occupational therapy, they

are not contained in the September 10 IEP. A full-time teacher associate has assisted Garret since first-grade with his educational needs, such as page turning, setting up his computer, assisting him in getting around the building. He is provided access to a personal computer and has special equipment provided to assist his access to the computer. He receives transportation to and from school, use of a lap tray on occasion, occupational therapy, and for two years he was in the school's extended learning (talented and gifted) program. He is in a regular physical education program with appropriate modifications. (This is mentioned, but not detailed in the IHP.)

It was stipulated by the District that a TA and a health care provider may not both be necessary to assist Garret at school. Should it be determined that the school is responsible for Garret's health care needs, the TA's duties may be assigned to the health care provider.

In 1993-94, District nurses salaries were governed by a master bargaining agreement. Under that contract, beginning nurses received an annual salary of $19,550. In addition, the District provided additional funds for insurance, retirement, and miscellaneous benefits in the amount of $8,681.75. The total expense for the employment of a beginning nurse in the District for the 1993-94 school year was $28,231.75. For a nurse with 10 years experience and no advanced college credits, the amount was $37,270.84. At the current time, the District employs no nurses with less than 10 years seniority.

The District does not currently employ LPNs, only RNs or Bachelor of Science Nurses (BSNs). Some teacher associates (TA) happen to have LPN licensure, but are not employed to perform LPN duties. The District does not hire nonlicensed

health care providers and would not allow health care to be provided by an unlicensed provider at school, even if arranged for and paid for by parents. No District school building currently has a full-time nurse. No student currently has a full-time nurse assigned to him or her.

The current TA assigned to assist Garret holds licensure as a LPN. The District made an effort to hire someone who could be delegated his health care services in the event it was later determined that they could be delegated. The TA does not currently provide LPN services due to the Board of Nursing Ruling on delegation.

The record establishes that for the purposes of employment, i.e. contracting, transfer, negotiating and termination, nurses are treated by state law and the District the same as licensed teachers. If the District hires a RN to serve Garret's needs at school, he or she will be doing so on the continuing contract law basis and would be employed for at least the entire remainder of the year whether or not Garret continued to need those services.

Garret is currently the only ventilator-dependent student in the District's schools; however, another such student may be coming to school in the near future. The District has provided, and currently does provide, many health care services for other students. Included are such services as care for students who need urinary catheterization, food and drink, oxygen supplement positioning, and suctioning. The primary difference between Garret's situation and that of other students is his dependency on his ventilator for life support.

The District currently has about 17,500 students in 33 school buildings. Approximately 2,200 students are identified as

needing special education or special services. Eight different persons are hired to provide nursing services to the District's K-12 students with a full-time equivalency (FTE) of 6.1 staff members (Brief of the District said 5.8, but the District staff in testimony said 6.1.) Only 1.4 FTE school nurses are funded with special education funds, and only one full-time school nurse serves students with disabilities.

In preparing for Garret's IHP meeting, District staff members made inquiries nationally about how supervision of a ventilator dependent child are handled. They learned that a wide variety of levels of supervision, a "whole gambit of care," is used in the care of ventilator dependent children at school. The range of training required for direct care and the supervision of such students nationally was from nonlicensed personnel to RNs.

The District's Manager of Health Services, a trained and experienced pediatric nurse, testified that it was her opinion that Garret's care at school required the supervision of a RN. She testified, along with other District staff members, that if the school were responsible for Garret's health care while at school, a RN would have to be on the school site to provide for care directly, or for supervision of the care provider. If the district were not responsible for Garret's health care at school, and Garret's family was responsible, he would be allowed to attend school with a LPN under the general supervision of a RN.

Apparently, the issues of delegation and supervision of health care duties by nurses are not static. A RN may "delegate" health care services requiring specialized training, but not licensure, to nonlicensed persons through the use of his or her "best judgment." On the other hand, "supervision" refers to overseeing or monitoring the provision of health care given by

a licensed health care provider, such as a LPN. From time to time, the Iowa Board of Nursing apparently attempts to provide direction on the scope of nursing practice. The result may be more confusing than helpful.

The District's special education school nurse testified that prior to 1988, she was able to exercise a considerable degree of delegation based on her professional judgment. As an example, she stated that prior to 1988, she was able to and did delegate in a number of situations, the feeding and administration of medications through gastronomy tubes to students while at school. Delegation was required practically because the District, as part of its effort to comply with the least restrictive environment mandate of the law, was attempting to close a segregated school facility serving, among other needs, students needing health care. Since it was not possible for the special education nurse to be on several sites at once while the gastronomy tube feeding and medication administration were taking place, she delegated the duties to nonlicensed staff she had personally trained.

Apparently, in 1988, the Board of Nursing issued a "guideline" or "position paper" outlining specific tasks that must be conducted in school settings by a RN, those that may be conducted by an LPN, and those that may be performed by nonlicensed staff. That 1988 document provided that only a RN could provide gastronomy tube feeding and medication and delegation of those tasks at District schools was stopped. The District then received a temporary waiver from the Board of Nursing for students in its many different buildings. That waiver was later rescinded. Even later, the guideline itself was rescinded and RNs again were able to delegate gastronomy tube feeding and medication administration. There is no indication in the

record that these changes in Board of Nursing interpretations ever occurred through the rule-making process envisioned in the Iowa Administrative Procedure Act (Chapter 17A, Iowa Code) and a review of current rules of the Board of Nursing contained in the Iowa Administrative Code contain no reference to specific duties and services that must be conducted by RNs or any other health care provider.

On May 20, 1994, the District filed a petition for a declaratory ruling with the Board of Nursing. The petition outlined Garret's health care needs and asked whether they could be delegated by a school employed RN to nonlicensed personnel. Under Section 17A.9 of The Code of 1993, state administrative agencies are authorized to issue rulings "as to the applicability of any statutory provision, rule, or other written statement of law or policy decision or order of the agency."

The Board of Nursing, in issuing a response to the District's request in Declaratory Ruling No. 63, dated September 22, 1994, accepted the competencies needed for a person providing care for Garret as described by his physician and mother, and concluded that they were competencies "within the scope of the practice of nursing and require the knowledge and skills attributed to nurses." An analysis of each of the nine needed tasks (competencies) being considered for delegation had been requested and received by the Board. The District response to the request stated that Garret's condition in regard to autonomic hyperreflexia was not stable, which is contrary to the remainder of the record in this hearing.

As authority for its conclusion, the Board cited a March 1988 "Position Statement of School Nurse Task Force," a "guideline for RN delegation to nonlicensed personnel," and a

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December 7, 1990, "Position Paper on Delegation" issued by the National Council of State Boards of Nursing, Inc. No citation was provided to state rules or statutes which specifically control the question and none has been found by this ALJ. (Perhaps, the 1988 document is that referenced in testimony of the school nurse, but she testified it had been recinded.) There was citation in the Ruling to 655-6.2(5) Iowa Administrative Code which reads as follows:

> 6.2(5) The registered nurse shall recognize and understand the legal implications of accountability. Accountability includes but need not be limited to the following:
>
> a. Performing or supervising those activities and functions which require the knowledge and skill level currently ascribed to the registered nurse and seeking assistance when activities and functions are beyond the licensee's scope of preparation.
>
> b. Assigning and supervising persons performing those activities or functions which do not require the knowledge and skill level currently ascribed to the registered nurse.
>
> c. Supervising among other things includes any or all of the following:
>
> (1) Personally observing a function or activity.

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> (2) Providing leadership in the assessment, planning, implementation and evaluation of nursing care.
>
> (3) Delegating functions or activities while retaining accountability.
>
> (4) Determining that nursing care being provided is adequate and delivered appropriately.
>
> d. Executing the regimen prescribed by a physician. In executing the medical regimen as prescribed by a physician (e.g., medication not administered) is not carried out, based on the registered nurse's professional judgment, accountability shall include but need not be limited to the following:
>
> (1) Timely notification to the physician who prescribed the medical regimen that the order(s) had not been executed and reason(s) for same.
>
> (2) Documentation on the patient/client medical record that the physician has been notified and reason(s) for not executing the order(s). Iowa Administrative Code 655-6.2(5)

That rule is extremely vague and provides no guidance to this ALJ as to "those activities and functions which require the knowledge and skill level currently ascribed to the registered nurse." (What are they and who ascribes them?)

The Ruling recognized, as does this ALJ, that the above rules "clearly" authorize a registered nurse to delegate functions or activities and holds the nurse accountable for such delegation, but, without being specific, the Ruling also stated that care included in the "core of the nursing process requires specialized nursing knowledge and judgment that may not be delegated." (What is the core of the nursing process?) The Board also stated in its Ruling that a nurse should "not delegate practice pervasive functions of assessment, evaluation, and nursing judgement." The Board Ruling concluded that the care of a student with Garret's medical needs at school could be delegated to nonlicensed personnel, but only if a supervising licensed RN was in the same building.

The Ruling in two places mentions Garret's current situation of service provided at home and school by a LPN and the year that services were provided at school by a "relative, both without criticism." It also recognized that his weekend care is provided by his family. The Ruling does not discuss the adequacy of this weekend care in the absence of a registered nurse on-site. The Ruling does not provide citation to the situational differences in nursing practice dependent upon whether a child is in school or in another situation. The record does not indicate whether or not the District appealed the Ruling under state law.

District staff, especially the school nurses, are under the belief that failure to follow the Ruling of the Board of Nursing may be punished by loss of nursing licensure.

The salary for the TA assigned Garret to assist with his educational needs for the 1994-95 school year is $8,366.09. With staff benefits of $1,182.13, the total cost of the TA to the District is $9,548.22. This amount of expense for Garret's education

would be saved if the District assigned TA duties to the health care provider. For purposes of equal comparison only, a beginning registered nurse in the District for 1994-95 would cost (salary and benefits) the District $28,630.79 ($28,231.75 for 1993-94), and a nurse with 10 years experience would cost the District $37,828.03 ($37,270.84 for 1993-94). Thus, if the District had to assign a RN full-time to Garret's attendance center and maintain a teaching assistant, the total District cost would be about $38,179.01 when a first year nurse is used and $47,376.25 when a nurse with 10 years experience is used. These figures would be reduced by a savings equivalent to .2 FTE nurse because a part-time nurse would not any longer need to be assigned to the attendance center. Reducing the building nursing costs by one-fifth, a full-time RN, and a TA assigned to the building for Garret in 1994-95 would cost the District about $32,452.85 for a nurse with one year's experience, and $39,810.64 for a nurse with 10 years experience. That is $22,904.63 and $30,262.42, respectively, more than the District currently pays for Garret's TA, only. If the teaching associate were reduced and her duties assigned to a RN supervising Garret's health care needs, the .2 FTE nurse currently assigned to the building could not be reduced, because the nurse assigned to Garret would not be able to give his or her attention to the students in the rest of the building. The approximate cost then would be $28,630.79 for a first year nurse and $37,828.03 for a nurse with 10 years experience. Added to that would be the cost of a .2 FTE nurse ($5,726.16 for a first year nurse, $7,565.61 for a 10-year nurse). Thus, using cost figures for nurses with no previous experience and those with 10 years experience, the additional cost range to the District for taking over responsibility for Garret's health care at school, and complying with the Board of Nursing interpretation of having a RN on-site would range between $28,630.79 and $39,810.64. (First year nurse assigned

teacher associate duties v. nurse with 10 years experience, teacher associate and reduction of the .2 FTE nurse).

These are potential increased costs to the District over the current cost of a TA only of $19,082.57 and $30,262.42, respectively. These potential costs reflect the use of a RN on-site to supervise or provide directly Garret's health care needs. The amount of difference depends on how the District would determine to provide the services. The record did not establish other potentially less costly approaches to those outlined here. Presumably, the District did not appeal the Declaratory Ruling of the Board of Nursing pursuant to the Iowa Administrative Procedures Act, and may be bound by it. 17A.9, 17A.19 I.A.C.

Garret is currently weighted for state aid funding purposes at 3.54 under a state rules exception which generates about $12,700 revenue to be divided between regular education and special education funds. No more than $3,600 is assigned to regular education funding. Normally, a student weighted 3.55 generates only .27 of the approximately $3,600 (1.0 weighting) for the regular education account ($972), and the remainder is placed in the special education account, but the record here is not clear on the exact amount due to Grant's weighting resulting from a rule exception. Garret receives no special education instructional services. Occupational therapy is provided by the AEA.

About $1200 average cost per special education pupil is spent for transportation in the District. Dollars generated through the weighted enrollment count are not assigned to any one child. District special education funds are pooled and may be used for the individual needs of any student with disabilities without regard to the amount of revenues actually generated as a result

of that individual student's enrollment in school. If District expenditures in special education in any fiscal year exceed revenues, the District may petition the state of Iowa through the School Budget Review Committee (SBRC) for replacement of the deficit funds. This is accomplished by the SBRC giving the District a pro-rated amount of funds returned to the state as a result of other districts having a surplus in their special education accounts and authority to raise the remainder through local property tax. At the current time, local deficit spending for special education can be made up through procedures provided in state law, and the educational needs of other students, both regular and special education, do not have to be affected. The District normally expends more funds annually on special education students than it generates under the weighted state aid formula.

Legal requirements and legal definitions of related services and the cost to the District are the only reason the District does not currently pay for Garret's health care services provided while at school.

The District Director of Special Services testified that, although Garret had previously been allowed to attend one year without a licensed health care provider, as provided by the family, the Ruling by the Board of Nursing now places that option in doubt. If health care at the school continues to be provided by the family, the District may not allow again the use of a nonlicensed health care provider in the future.

In response to the ALJ's question about the type of program someone like Garret would be provided without external funding support through a trust fund, insurance or Medicaid, and with the District's continued refusal to provide health care services,

the District's Director of Special Needs indicated that a homebound program would be the likely alternative to the current situation. In objecting to the question, the Attorney for the District opined that some type of funding would likely be available in the event that insurance and trust fund resources become exhausted. The record not clear on that point.

In rebuttal testimony, Garret's pediatrician expressed disagreement with the District's IHP conclusion that Garret required constant health care supervision, monitoring, and assessment by a registered nurse on site. He stated that someone specially trained on the ventilator would need to be within "earshot" at all times to respond to Garret's health needs, especially when his ventilator signals problems, but that constant health monitoring was not required. In his opinion, medical judgment would be more important in later determining an underlying cause of a problem, but was not necessary in immediate response situations. For instance, a monitor would need to unplug a clogged tracheostomy tube, but medical judgment would not be required until later in an effort to determine why the tube became plugged. The physician again stated that Garret is in generally good health and has not required his professional attention for some time, except for colds and sore throats. He stated that Garret's autonomic hyperreflexia condition was stable.

Also, in rebuttal testimony, Garret's father testified that Garret visits him in his home every other weekend without nursing or other health care services. He is frequently accompanied by a young friend who can be with Garret and see to his needs when the father is not in the immediate vicinity.

Garret's mother reiterated in rebuttal testimony that there

is no nursing service provided Garret from the end of the school day until about 11:00 p.m. on school days or at any time on weekends. Garret has friends over and sometimes goes to the homes of friends. He frequently goes outside into the family yard by himself. Persons are not always in his immediate proximity, but neither is he left completely alone. She stated that health care at school can be provided by a properly trained nonlicensed care provider just as occurs at times at home and that she would prefer to do the training herself. She stated that she had previously trained all the nurses herself. She strongly denied that a licensed nurse was required to care for Garret. She stated again during rebuttal that a LPN and services of a health care agency were used by her only because the insurance company would not pay a nonlicensed person to provide care.

Conclusions of Law

The issues presented in this appeal are clearly the result of honest differences of opinions on what the law and best practice require. There is no evidence that personal animosity or hostility have been present.

The primary issue in this appeal is whether Garret's mother is responsible for providing his health care needs while he is at school or whether his health care at school must be provided at no cost to the parent as part of a free appropriate public education. 20 U.S.C. Section 1412. This issue has been the subject of dispute and litigation in numerous locations around the country, but appears to be one of first impression in Iowa.

Federal statutes at 20 U.S.C. Section 1412 provide that children with disabilities, including "orthopedic impairments" and "other health impairments," are to be provided "special

education and related services" when their disabilities adversely affect their academic performance. 34 C.F.R. 300.7(a)(1); 300.7(b)(7); 300.7(b)(8). Federal law is mirrored in state law which requires children handicapped in obtaining an education because of disabilities, including physical, be provided "special education." That term includes instruction, "transportation and corrective and supportive services required to assist children requiring special education" in obtaining "educational programs and opportunities." Section 256B.1, Iowa Code 1993; 281-41.2 and 41.3, Iowa Administrative Code.

Federal law requires that special education and related services be provided to the maximum extent appropriate with children who are nondisabled. 20 U.S.C. Section 1412; 34 C.F.R. 300.550. Iowa may be more proscriptive when it requires that:

> to the *maximum extent possible,* children requiring special education *shall* attend regular classes and *shall* be educated with children who do not require special education. *Whenever possible*, hindrances to learning and to the normal functioning of children requiring special education within the regular school environment *shall* be overcome by the provision of special aids and services rather than by separate programs for those in need of special education. Special classes, separate schooling or other removal of children requiring special education from the regular educational environment, *shall occur only when,* and to the extent that the nature or severity of the educational handicap is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily. (emphasis added). 256 B.2(3), Iowa Code 1993.

Unlike state law, which includes corrective and supporting services in its definition of special education, federal law treats special education and related services somewhat separately. As defined in federal law, a related service is defined as any service "required to assist a child with a disability to benefit from special education," and includes "school health services." 34 C.F.R. 300.16. "School health services means services provided by a qualified school nurse or other qualified person." 34 C.F.R. 300.16 (b)(11). "Medical services" are expressly included as a related service, but are limited in definition to "services provided by licensed physician to determine a child's medically related disability." 34 C.F.R. 300.16 (b)(4). Related services, thus, includes a physician's diagnostic and evaluation services, but not treatment services. 20 U.S.C.A. Section 1401(a)(17), 1994 Supp.

The issue of exclusion of medical treatment as a related service was the primary issue before the Supreme Court in *Irving Independent School District v. Tatro,* 104 S.Ct. 3371 (1984). Amber Tatro was an 8-year-old girl with spine bifida. As a result, she had orthopedic impairments and was, like Garret, unable to empty her bladder voluntarily. In order to prevent injury to her kidneys, she was catheterized every three to four hours, including the time she was at school. The Court characterized catheterization as a simple procedure that could be "performed in a few minutes by a lay person with less than an hour's training." *Id.*, at 3374. Amber's parents, babysitter, and teenage brother were all qualified to administer the procedure.

The legal issue arose, however, when school officials refused to allow school personnel to administer catheterization while Amber was at school. The school argued that catheterization was a medical service which exceeded the diagnosis and evaluation limitations of the medical service requirement of related services.

In its analysis, the Court determined that catheterization was a related service because it "enabled a handicapped child to remain at school during the day" and thus have meaningful access to education. *Id.*, at 3377. The Court also determined that catheterization did not fall into the medical treatment exclusion of the statute or Department of Education rules. It affirmed the Department's interpretation, through rule making, that the services of a school nurse could be required as a related service, and treatment by a "licensed physician" could be excluded.

In dicta, which later became important in other subsequent litigation on the issue, the Court noted that a distinction between nursing services and treatment by a physician as a related service was reasonable. Part of the reasonableness was concluded to be a consideration of differentiation of costs between nursing and physician services and the fact that school nurses "have long been a part of the educational system." *Id.*, at 3378.

The Court did not say that cost was a factor to be considered by courts. It merely speculated that Congress and the Department of Education may have used expense, as well as limitations of educators' expertise in medical matters, for making a distinction between nursing services and physician treatment as a related service. The Court expressly rejected the school's argument that services provided in accordance with a physician's prescription

and general supervision fell within the medical treatment exclusion. It noted that nurses in the school were authorized to dispense medications and administer emergency injections to nondisabled students in accordance with a physician's prescription. *Id.*

Thus, in *Tatro,* the Court affirmed a Congressional and administrative distinction between nursing services and medical treatment as a related service under the Education of the Handicapped Act, now Individuals with Disabilities Education Act (IDEA).

A number of courts have been asked to further clarify the issue of medically related services in the school setting. The case of *Detsel v. Board of Education,* 637 F.Supp. 1022 (N.D.N.Y. 1986), involved a seven-year-old child with severe physical disabilities who had greater health care needs than does Garret. She required constant respirator assistance and a continuous supply of 40% oxygen. Her vital signs had to be checked regularly and appropriate medication administered through a tube. As a result of a tracheostomy, the nurse would cause a saline solution to be ingested into the lungs of the girl, she would strike her about the lungs for several minutes, and then suction out the mucous collected in her lungs. The nurse had to be prepared to perform cardiopulmonary resuscitation and to act in the life-threatening situation of possible respiratory distress. The girl's own physician testified that the services of a regular school nurse would not be adequate. She required the service of specially trained nurses 24 hours a day. The legal issue of related services arose when she started kindergarten and the county department of social services, who had been supplying the nursing care, refused to pay for a nurse to accompany the girl to school. The girl's school was asked to

pay for the nursing care while she was at school, but the school declined arguing that the extensive medical attention required exceeded the related services requirement.

In its analysis, the district court included an expense factor which it incorrectly attributed to the Supreme Court ruling in *Tatro*. The district court said that the Supreme Court had said that "medical services which would entail great expense are not required," and that Congress had intended to protect schools from unduly expensive services. *Id.*, at 1026. Both statements are taken out of context and the Supreme Court had actually said neither. As stated previously, the Supreme Court had merely speculated on the possible reasons Congress may have had in differentiating between nursing services and medical treatment and said that cost and medical competence of educators may have been among such reasons. *Irving Indep. Sch. Dist. v. Tatro*, 104 S.Ct. 3371, 3378 (1984).

The district court in *Detsel* incorrectly said that the Supreme Court in *Tatro* had "clearly" considered the extent and nature of the services required and thus took *Tatro* as a license to do the same. *Detsel v. Board of Educ.*, 637 F.Supp. 1022, 1026 (N.D.N.Y. 1986). It concluded that because constant monitoring was required to protect the student's life, the procedures required were much more extensive than mere catheterization, and the procedures required a person specially trained beyond that which a school nurse would have been, that the health care services required in the situation before it fell within the medical services exclusion. However, as stated earlier, there is nothing in the *Tatro* decision, express or implied, that established the relevancy of the nature or extent of the services required. The closest thing it said was a comment as an aside that something less than nursing services were required in the factual situation before it. *Irving Indep. Sch. Dist. v. Tatro*, at 3371, 3379 (1984).

The district court concluded in *Detsel* that the health care services needed in the situation before it did not require a physician, but neither did they qualify as "simple school nursing services." *Detsel v. Board of Educ.* 637 F.Supp. 1022 (N.D.N.Y. 1986). (Where the word "simple" came from is unclear because it was not used in *Tatro*.) It held that even though a physician's services were not expressly required, excluding the services required of the girl while at school, was in keeping with the "spirit" of the exclusion. It ruled that the school did not have to provide the services requested.

The Second Circuit upheld the district court in a brief *per curiam* decision. *Detsel v. Board of Educ.*, 820 F.2d 587 (2nd Cir. 1987). The Detsel family, after additional litigation, was able to obtain Medicaid payment for the services. *Detsel v. Sullivan*, 895 F.2d 58 (2d Cir. 1990).

The *Detsel* result was followed in another ruling, *Bevin H. v. Wright*, 666 F.Supp. 71 (W.D. Pa. 1987), which involved an even more severely disabled student. The seven-year-old had Robinow Syndrome (fetal face syndrome), severe broncho-pulmonary dysplasia, profound mental disability, spastic quadriplegic, seizure disorder, visual impairment and hydrocephalus. She breathed through a tracheostomy tube, and was fed and medicated through a gastrostomy tube. Nursing services at school were extensive.

> The attending nurse must accompany Bevin to and from school. She is responsible for the care and cleaning of the tracheostomy and gastrostomy tube. She administers a constant oxygen supply to Bevin. She supervises positioning for physical and occupational

> therapy. She administers chest physical therapy each day to break up mucous, and must suction the mucous from the lungs. Above all, though, the nurse must remain with Bevin at all times because of the constant possibility of a mucous plug in the tracheostomy tube. Such a plug is a common event, occurring several times each day, and must be cleaned by the nurse within 30 seconds to prevent injury to Bevin. *Id.*, at 73.

The student's parents at first agreed to pay the health care costs for their daughter to attend school, and did so through insurance. As the insurance coverage ceiling was being approached, they requested the school to pay the $1,850 monthly nursing cost for health care while Bevin was at school. The school refused, and the parents challenged the refusal. After two administrative proceedings, the issue was appealed into federal court.

Before the district court, the parents argued that under the *Tatro* ruling, a clear line between health services provided by a physician and other health services should be drawn, and the nature and extent of the services provided should be otherwise irrelevant. If a physician's services were not required, health care services at school should be considered a related service to be provided by the school. *Id.*, at 74. The court, however, found the reasoning in *Detsel* to be "persuasive," and declined to follow the "bright line" definition of "school health services" and "medical services." *Id.*, at 75.

Instead, it followed the ruling in *Detsel* and found the health care services required by Bevin to be inconsistent with the

"spirit" of related services. *Id.* They were "varied and intensive," "must be provided by a nurse," were "time-consuming and expensive," demanded the "constant attention of the nurse," and were "life-threatening." The court concluded, the services required were more in the way of "medical services" than related services. *Id.* at 76.

The decisions in *Detsel* and *Bevin H.* have recently been followed in *Granite School District v. Shannon M.*, 787 F.Supp. 1020 (D. Utah 1992). The *Shannon M.* case involved a six-year-old student with congenital neuromuscular atrophy, severe scoliosis, and confinement to a motorized wheelchair. She was fed through a nasogastric tube and breathed through a tracheostomy tube. The latter tube had to normally be cleared five times during a three-hour school day, and occasionally became plugged anyway, causing a life-threatening situation. Someone had to be nearby and Shannon's doctor had issued a "do not resuscitate" order (heroic measures were not to be used if Shannon suffered cardiac arrest). The issue before the court was whether the health care needed to attend school was required to be provided by the school: "whether full-time nursing care for Shannon is a supportive service required by the Act, or whether it is a medical service excluded under the Act." The school estimated the annual cost of care at $30,000.

The court rejected the "bright line" argument put forth by Shannon's parents. It said that it would not judge whether the needed services were excluded as medical services solely on the facts of whether a physician's services were required. Instead, it made its determination on the extent and nature of the services. It concluded that the constant nursing care required did fall within the medical services exclusion of IDEA. *Id.*, at 1030.

In a decision based on facts nearly identical to those involved in this appeal, a New York appellate court expressly followed the *Detsel* ruling. *Ellison v. Board of Education*, 597 N.Y.S.2d 483 (A.D. 3 Dept. 1993).

Other courts have been more reluctant to stray from the Supreme Court ruling in *Tatro*. In *Macomb County Intermediate School District v. Joshua S.*, 715 F.Supp. 824 (E.D. Mich. 1989), the issue was the obligation of the school to provide health care services during transportation to and from school. Joshua was "severely multiply impaired," and required suctioning of his tracheostomy tube. Other details of his health care needs were not provided by the court, but a local hearing officer had referred to his "medically fragile nature." The school did not object to providing Joshua's health care needs either at school or at home. It objected to providing the services during times of transportation between home and school.

In its analysis, the court twice expressly rejected the legal conclusions of both the *Detsel* and *Bevin H.* cases. In doing so, the court stated:

> As *Tatro* repeatedly stressed, the reason for mandating the provision of supportive services under the EAHCA is to guarantee handicapped students an opportunity to gain an education. If granting such an opportunity entails furnishing medically related services short of requiring a licensed physician, we believe such services are the student's right. Moreover, the EAHCA, its legislative history, and its regulations are void of any suggestion that states are free to decide, on the basis of

> the cost and effort required, which related services fall within the medical services exclusion. *Id.*, at 827.

The court in *Joshua S.* concluded that the medical services exclusion is limited to services provided by a licensed physician.

> While disagreement exists as to whether a trained lay person could adequately service the defendant's needs, we believe that *Tatro* supports the use of a medical professional, other than a physician, if necessary to the safe transport of the [student]. *Id.*, at 828.

The most recent court ruling on the subject has taken more of a middle ground on the issue. The case of *Neely v. Rutherford County Schools*, 881 F.Supp. 888 (M.D. Tenn. 1994), involved a seven-year-old child with congenital Central Hypoventilation Syndrome, a rare condition that results in trouble breathing. She had undergone a tracheostomy procedure to aid in her breathing and needed a ventilator while she slept. Her breathing passages had to be suctioned regularly to remove secretions. An ambu bag was used to assist her breathing when her tube had become blocked or dislodged. A "well-trained, poised individual" was required to provide health care services. She required constant monitoring, and the attendant could never be far away.

In its analysis, the court in *Neely* rejected both the bright line rule and the nature of services and cost test and settled on a "direct" test. *Id.* at 893. It proposed to examine the "direct" burden imposed on a school rather than artificial effects of such things as the status or title of the care provider.

In its direct burden analysis, it noted that a full-time nurse or respiratory care specialist was required to provide the student with nearly full attention while in school. However, the cost to the school was merely a base salary of $13,680, so that while the services were considered medical in nature, the overall cost was not burdensome on the district. The court also noted that a home-schooling program would not be without its costs to the school. The court concluded that, "absent evidence that the care requested would be unduly burdensome to the school district, the nursing care will be deemed a related supportive service that falls outside the medical services exclusion." *Id.*, at 894.

With at least three different perspectives or interpretations, it is little wonder that differences of opinion, such as we have here, may arise.

Since the issuance of the *Tatro* ruling ten years ago, this ALJ has had occasion to read it at least a dozen times. Every time it has been read, it was thought to have affirmed a "bright line" distinction between "school health services" ("Services provided by a qualified school nurse or other qualified person") and "medical services" provided by a physician that are not related to evaluation and assessment. If a nurse's services were needed, the school had to provide them as a related service. If the service "must be provided" as treatment by a licensed physician, the services were not a related service. The Court in *Tatro* even discussed with approval the provision of health care services under a physician's prescription and "ultimate supervision." *Irving Ind. Sch. Dist. v. Tatro,* 104 S.Ct. 3371, 3378 (1984). The Court did not ever say that the cost and extent of medical expertise were relevant, only that Congress and the Department of Education may have considered them.

Nothing in the subsequent rulings in *Detsel, Bevin H., Shannon M., Ellison,* or *Neely* has changed this ALJ's understanding of *Tatro.* Like the Court in *Joshua S.*, he is not able to find the distinctions made in these rulings. It appears more to this ALJ that those courts were substituting their own judgment for that of Congress and the Department of Education. They stretched some statements of the Supreme Court completely, and took others out of context to fashion what they thought "should be." As much as this ALJ may disagree with the public policy of spending education funds on health services, he does not feel he has the authority to change the law.

The brief for the District argues that the bright-line test for the medical exclusion is weak because it is based on the title of the person providing services (p. 13). Indeed, this was the rational used by several of the courts cited above that distinguished *Tatro.* This argument falls short of the mark because the bright-line test does not use the title of the person providing the service, i.e. lay person, nurse, physician, but whether the service "*must* be performed by a physician" (emphasis added). *Irving Ind. Sch. Dist. v. Tatro,* 104 S.Ct. 1371, 1378 (1984). *See Max M. v. Thompson,* 592 F.Supp. 1737 (N.D. Ill. 1984). Thus, the issue to be determined in the medical exclusion exception is not who provides the service, but whether the service is in the special training, knowledge, and judgment of a physician to carry out. This appears to be the position of the office of Special Education Programs in the Department of Education. *See Guard to Johnson,* 20 IDELR 175 (1993).

The Department of Education rules clearly require nursing services as a related service. 34 C.F.R. 300.16(b)(11). If limitations as to amount, cost or special training were meant to apply, they could have been expressly stated. They were not.

Appendix C

Several citations to pre-*Tatro* rulings on related services were provided by the parties. Because they were issued prior to the Supreme Court review of the issue, and provide no great insight, they are of limited value in understanding where we are now.

This ALJ finds under *Tatro* and *Joshua S.* that the health care needs of Garret F., while at school do not require the direct attention and provision by a physician and do not fall within the physician treatment exclusion of related services. He further finds that the health care services, which are needed by Garret, must be provided by a "qualified school nurse or other qualified person" and are thus "school health services" required by IDEA as a related service.

This ALJ also finds that even when the other tests and criteria found in *Detsel, Bevin H.*, and *Shannon M.* are used, the health care services necessary for Garret are a related service. While Garret needs much in the way of the same health care services as the students in those cases, his general good health, ability to communicate his needs, intelligence, and other factors weigh heavily in distinguishing him from the students in these rulings. Clearly, the students in *Detsel, Bevin H.*, and *Shannon M.* were more "fragile" in the true sense of the word. While testimony differed at the hearing as to the proper level of licensure needed by the person to care for Garret at school, it was obvious that in most situations a conscientious lay person could be, and has been in the past, trained to provide the necessary care. Unless Garret's situation changes in the future, such as a reoccurrence of antonemic hyperreflexia, which may need assessment of a professional nature on a reoccurring basis, there appears no practical need for Garret to be attended by even a licensed health care professional. His attending pediatrician has repeatedly so stated.

Appendix C

If one were to apply the balancing test used by the court in *Neely,* the same result occurs. The increased expense to the District of hiring a full time RN, as required by the Board of Nursing Ruling and its own practices over what it now expends for Garret, would range between $20,000 and $30,000. For a special education budget as large as the District's in serving 2,200 special education students, that is not "over-burdensome." (In one recent ruling, the $94,000 annual cost of one student's special education program was not considered relevant, even when the district's total special education budget was $572,000; *Cremeans v. Fairland Local Sch. Dist.* 633 N.E. 2d 570 (Ohio App. 4 Dist. 1994). This is even more true when it is remembered that special education revenues generated by a district are pooled to serve the needs of all students with disabilities in a district, and the state provides ways for schools to recover special education funds expended in excess of revenues generated under the state's controlled budget for schools.

While the District would point to the additional cost of $20,000 to $30,000 for RN services arguably required additionally to meet Garret's health care needs while at school, it should be remembered that little actual difference exists between the services needed by Garret while at school and services the District now provides, or has provided, other students. Other students have required tracheostomy suctioning, ambu bagging, help with food and drink, catheterization and positioning. Other students have received additional health care services, such as gastronomy tube feeding and administration of medication. The main difference between Garret's needs and those currently or historically met by the District is the monitoring of Garret's ventilator.

Under Iowa statute, the dichotomy of specific related

services is not as apparent as it is under federal law. Section 256B.2, subsection 1 defines "children requiring special education" as persons between the ages of 0 and 21 who are handicapped in obtaining an education because of a disability, including physical disabilities. Subsection 2 defines "special education" as instruction "designed to meet the needs of children requiring special education, transportation, and corrective and supporting services required to assist children requiring special education," in taking advantage of "educational programs and opportunities" (not only special education programs).

Clearly, Garret is physically handicapped and, under state statute, requires "corrective and supporting services" to take advantage of "education programs and opportunities." Read together with the least restrictive environment (LRE) provisions of subsection 3, the District has clear responsibility under state law, as well as federal law, for providing Garret with the health care services he needs in the school setting. The Iowa LRE requirements are quite specific:

> This chapter is not to be construed as encouraging separate facilities or segregated programs designed to meet the needs of children requiring special education *when the children can benefit from all or part of the education program as offered by the local school district.* To the *maximum extent possible,* children requiring special education *shall attend regular classes* and *shall* be educated with children who do not require special education. *Whenever possible,* hindrances to learning and to the normal functioning of children requiring special

> education within the *regular school* environment *shall* be overcome by the *provision of special aids and services* rather than separate programs for those in need of special education. Special classes, separate schooling, or other removal of children requiring special education from the *regular* education environment, shall occur only when and to the extent that the nature or severity of the educational handicap is such that education in regular classes, *even with the use of supplementary aids and services,* cannot be accomplished satisfactorily. (Emphasis added.) 256 B.2(3), Iowa Code 1993.

Under Iowa statute, Garret is a child requiring special education, and a six-year history of successful functioning in the regular classroom, with aids and services provided by his family and the school prove beyond a doubt that it can be accomplished satisfactorily. Under state law, Garret must be provided an education program "within the regular school environment," and under the same state law; it is the District's responsibility to do so. Section 256B.2 Iowa Code; *see also* 280.8 Iowa Code.

It should be noted that state provisions for special education determined to create a higher standard of duty on schools than what the federal law may require have been deemed by some courts to be automatically incorporated into IDEA. *See David D. v. Dartmouth Sch. Comm.*, 615 F.Supp. 639 (D. Mass. 1984); *Barwacz v. Michigan Dept. of Educ.* 674 F.Supp. 1296 (W.D. Mich. 1987); *Pink v. Mt. Diablo Unif. Sch. Dist.*, 738 F.Supp.

345 (N.D. Cal. 1990); *Doe v. Board of Educ.*, 9 F.3d 455 (6th Cir. 1993).

As a second issue, the District has raised an interesting argument regarding Garret's eligibility for related services under federal law. (In light of the foregoing discussion of state law in which supportive services are part of the definition of special education, federal law may not be of great significance on this point, however.) The District argued that under federal law, a student who does not need special instruction is not entitled to related services. Since Garret has never had special instruction and does not now ask for any, he is not entitled to any related services, including health services, or not.

This argument is interesting because in the strict language of the law, it appears to be correct, but in actual practice, it is not.

In the Supreme Court ruling in *Tatro*, the Court attempted to establish that schools did not have to provide students with unlimited related services. It said that in order to be entitled to related services, "a child must be handicapped so as to require special education." *Irving Ind. Sch. Dist. v. Tatro*, 104 S.Ct. 3371, 3378 (1984). The Court went on to say:

> In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act. *Id.*

Authority for this position is found in the Note to the Department of Education Rules found at 34 C.F.R. 300.17. The relevant part of that comment states:

> The definition of special education is a particularly important one .... [i]f a child does not need special education, there can be no related services, and the child is not a child with a disability and is therefore not covered under the Act.

The definitions of special education contained in Rule 300.17 encompassed only "specially designed instruction . . . to meet the needs of a child with a disability," and a related service "if the service consists of a specially designed instruction . . . and is considered special education rather than a related service under state standards."

At first glance, the above quoted rules and the language from *Tatro* might be interpreted to mean that a student with a disability who needs only related services to be successful in school and does not need special instruction, does not qualify to be identified as a special education student. However, the problem with that argument becomes apparent fast. Amber Tatro was born with spina bifida and as a result required only a related service, catheterization, to remain in the regular school environment. There was no indication in the ruling in *Tatro* to indicate that she also needed a special or modified education program. Yet the Court ruled in her favor on the issue of related services. The Court distinguished a service required for a student during non-school hours. *Irving Ind. Sch. Dist. v. Tatro*, 104 S.Ct. 3371, 3378 (1984).

A closer look at federal rules may provide the answer. Rule 300.17 and its following note quoted above was meant to define "special education" only, and to be differentiate special education from related services. Rule 300.7 provides that

"children with disabilities," including physical disabilities, means those children who because of their disabilities need special education and related services. Thus, related services can stand alone for those students who need only those services to succeed in regular education. The Court said in the ruling in *Tatro*: "A service that enables a handicapped child to remain at school during the day is an important means of providing the child with a meaningful access to education that Congress envisioned." *Id.* at 3377. Clearly, that is Garret's situation.

For six years, the District has provided the related services of a teacher associate, special transportation to and from school (which under state law should be in an IEP, but wasn't, 281-41.8 I.A.C), occupational therapy, and special equipment, which may be considered assistive technology. For at least that time, the District has identified and weighted Garret for funding under state law, and provided an IEP for Garret. It is more than a little inconsistent for the District to disavow its past now that Garret's family also wants assistance with health care costs.

As stated previously, federal distinctions between the entitlement to special education and related services, if any, are not included in Iowa statute. By statutory definition, "special education" means specialized instruction, transportation and "corrective and supporting services." Thus, even if federal law did not require school health care services for Garret, state law does.

Until now, and possibly into the future, Garret has had insurance and a trust fund to aid in the financial support of health care services at home. District staff members anticipate that a second ventilator dependent student may soon be attending school in the District. That student's health care needs are likely

to be met through Medicaid. Yet, it is possible that some ventilator dependent student, who like Garret is bright, personable and creative, may come along some day who does not have, or does not qualify, for outside support for health care needs while at school. The only apparent alternative is a home-bound program. If the District refuses to provide health care and the family can't provide it, there is no middle ground. While the law anticipates that the appropriate program for some children will be an education program provided at home, that appears to be totally inappropriate for Garret and any similar student. The lack of stimulation he now receives from a variety of teachers and peers would have a profound effect on the rest of his life. A home-bound program would certainly not be an education with nondisabled children to the "maximum extent appropriate." 34 C.F.R. 300.550. Clearly, Garret receives much more benefit from his being in school than his being at home, his presence is not substantially disruptive to the school environment and his teacher's time is not unduly taken up working with him individually. Under Iowa statute, only when a child "cannot sufficiently profit from the work in the regular classroom" may he be removed. Section 256B.8, Iowa Code 1993.

A significant bone of contention in this appeal is the Board of Nursing interpretation that the health care services needed by Garret must be provided or supervised by an on-site RN. This requirement increases the annual cost of such services to the District by about $20,000. If this requirement were not present, the District could assign Garret's health care duties at school to his current TA, who is a LPN, as well as her current TA duties at a minimum of additional expense (perhaps, training in Garret's particular ventilator).

Clearly, District nurses and other District staff fear that the nursing licenses of District nurses who supervise the TA, who is also a LPN, without being on-site full time, or who delegate Garret's health care needs to a nonlicensed provider without being on-site, will be placed in jeopardy. Both Garret's mother and pediatrician testified that a RN is not actually required to be present on site to provide adequate health care for Garret while at school. All Garret really needs is a qualified, conscientious, and trained person within earshot to respond to his immediate needs.

The District argues that this ALJ has no authority to determine issues of professional licensure or delegation of nursing duties. This ALJ is happy to concede this lack of authority. That does not, however, resolve the District's responsibility to provide health care services to Garret at school. The Appellant argues that the Declaratory Ruling issued by the Board of Nursing is not binding on her because she was not a party to its request. While that may be true, it has a practical impact on services to Garret because the District is likely bound by the Ruling.

The practical result is that the issue of proper licensure in this appeal remains a mess, a mess which should be better resolved by the Board of Nursing. Iowa statute provides the Board of Nursing with the role of determining the parameters of nursing duties. Section 152.1, Iowa Code 1993. If it has done so before now, this ALJ has not been able to identify where it is to be found. The rules of the Board of Nursing found in Rule 655-6.2 I.A.C. speak only in vague terms like "scope of nursing practice," which shall not include those practices currently ascribed to the advance registered nurse practitioner;" "nursing process in the practice of nursing consistent with accepted and

prevailing practice," and "knowledge and skill level currently ascribed to the registered nurse." These definitions certainly provide little guidance to the lay person, or likely anyone else.

The rules certainly provide little guidance to Rns and maybe even the Board, itself. (The above quoted rule was published in the I.A.C. on 8-26-87). A RN employed by the District testified that she had delegated some health care for students at school on the basis of her own professional judgment until 1988 when the Nursing Board issued a "guideline" on in-school delegation. The guideline apparently said that nurses could not delegate the particular procedure. A waiver was requested and received by the District, only to later be withdrawn by the Board. Even later, the Board apparently withdrew the entire guideline.

In the Declaratory Ruling in question, the Board was to provide the "applicability of any statutory provision, rule, or other written statements of law or policy, decision or order of the agency." 17A.9, Iowa Code 1993. If the Board Ruling did this, this ALJ is not aware of it. The only citation to law in the Ruling was to the vague and largely confusing rule at 655-6.2 I.A.C. Reference was made in the Ruling to two named documents, but nothing like them adopted as Board rule or policy has been determined. They were not even attached to the Ruling for proper reference. Yet, the whole purpose of the Administration Procedure Act is to make agency rules and policy known and understood. Nursing rules and policy, or the lack thereof, certainly have resulted in a great deal of confusion in this situation. We have here a situation where it has been determined by the Board of Nursing that a RN must be at the school site to supervise the health care needs of Garret. No mention is made of the current situation with services of a LPN provided by the family with distant RN supervision, or the same

at home, or not having nursing services during part of the day or on weekends. Why is Garret's situation in school, if the school is responsible, different than when the school is not responsible or Garret is elsewhere?

The Board of Nursing does a great disservice to the licensed nurses it supervises and the persons they serve by not doing a better job of carrying out its statutory duty to identify the role of nurses.

The Appellant contends that she has requested assistance with the costs of Garret's health care needs at school for several years, and she may well have done so. The record, however, establishes this with some certainty only since the spring and summer of 1993. Because that is the most definite time the issue arose and the District specifically declined, the District responsibility to provide Garret's health care services under this appeal ruling shall be considered to have begun with the 1993-94 school year.

It should be noted that the District did not fully comply with the parental rights requirement of full detailed notice when it refused to request payment of health service costs in the fall of 1993. 34 C.F.R. 300.504 (a)(2); *See Evans v. District No. 17,* 841 F.2d 824 (8th Cir. 1988). However, this appeal is evidence that the failure did not prejudice Garret's mother in the exercise of her legal rights, and no major harm resulted. *See Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990); *Miles S. v. Montgomery County Bd. of Educ.*, 824 F.Supp. 1549, 1557-58 (M.D. Ala. 1993).

All motions and objections not previously ruled upon are hereby overruled.

The affidavit of appeal filed by the Appellant raises only the issue of the District's refusal to provide health care services for Garret after the September 10, 1993, IEP meeting. On that issue, the Appellant prevails.

Decision

The Cedar Rapids Community School District is hereby directed to reimburse the Appellant for Garret F.'s health care costs while at school for the 1993-94 school year. While no other school year was specifically included in the appeal affidavit, it should not be forgotten that this appeal has been pending for over a year. There is certainly nothing in the record to indicate any reason that the District should not currently be providing school health care for Garret as a related service.

Respectfully submitted.

s/ Larry D. Bartlett
Larry D. Bartlett, J.D., Ph.D.
Administrative Law Judge

Date: December 16, 1994

APPENDIX D — LETTER FROM THE OFFICE OF SPECIAL EDUCATION PROGRAMS OF THE U.S. DEPARTMENT OF EDUCATION

John Anderson
Superintendent
Special Education District of Lake County
4440 Grand Avenue
Gurnee, Illinois 60031-2689

Digest of Inquiry
(October 1, 1993)

• Are school districts required to provide one-to-one nursing services necessary for a student with disabilities to attend a public school setting?

Digest of Response
(February 22, 1996)

Provision of Nursing Services Must Be Decided on Case-by-Case Basis

The determination as to whether a school district must provide one-to-one nursing services to a student with a disability in the public school setting must be made on a case-by-case basis in light of the particular facts and circumstances involved. For this reason, OSEP refused to express any view as to whether such services are a required related service under special education laws.

Appendix D

Text of Inquiry

Please advise regarding OSEP's position related to a school district's requirement to provide one-to-one nursing services necessary for a student with disabilities to attend a public school setting. Does OSEP consider this service to be a required related service or a medical service as determined by several recent federal court decisions?

Thank you in advance for your assistance with this request.

Text of Response

This is in further response to your letter requesting clarification regarding whether school districts are required to provide "one-to-one nursing services necessary for a student with disabilities to attend a public school setting." Specifically, you seek the views of the office of Special Education Programs (OSEP) as to whether such services are eligible school health services or excluded medical services. Please excuse the delay in issuing our response.

In our initial letter acknowledging receipt of your inquiry, we indicated that our response also would address the requirements of Federal civil rights laws enforced by the Department's Office for Civil Rights (OCR) that prohibit discrimination on the basis of disability in the provision of educational services to disabled students. Officials of OCR have reviewed your inquiry and have advised that the analysis that follows also reflects the obligations of school districts to provide educational services to disabled students in accordance with the requirements of Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act Of 1990, Title II.

Appendix D

Under Part B of the Individuals with Disabilities Education Act (Part B), each State and its local school districts must make a free appropriate public education (FAPE) available to all children with specified disabilities residing within the State in mandatory age ranges. 20 U.S.C. § 1412(2). FAPE includes, among other elements, the provision of special education and related services at no cost to the parents, in conformity with an individualized education program (IEP). 34 CFR § 300.8.

A threshold issue raised by your inquiry is whether "one-to-one nursing services" to enable a disabled student to attend school would be considered an eligible "school health service," or an excluded "medical service" because the services are for purposes other than those that are "diagnostic and evaluative in nature." 34 CFR § 300.16(b)(4) and (b)(11).[1] Courts that have addressed this issue have reached differing conclusions based on factors such as the nature and intensity of the nursing services required for a particular student and the level of skill required of the individual performing the services. If the care required is intermittent and could be provided by a regular school nurse, courts have generally held that the service is an eligible related service. *See e.g., Irving Independent School District v. Tatro,* 104 S.Ct. 3371 (1984), *Department of Education, State of Hawaii v. Katherine D,* 727 F.2d 809 (9th Cir. 1984), *cert. den.* 471 U.S. 1117 (1985) and *Macomb County Intermediate School District v. Joshua S,* 715 F. Supp. 824 (E.D. MI. 1989). However, if the care required is continuous, courts, relying on the private duty aspect of the services, generally have held that the service

1. The term, "medical services," "means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 CFR § 300.16(b)(4). The term "School health services" "means services provided by a qualified school nurse or other qualified person." 34 CFR § 300.16(b)(11)

Appendix D

is an excluded medical service. *See e.g., Neely v. Rutherford County School District,* 68 F.3d 965 (6th Cir. 1995); *Detsel v. Board of Education of Auburn Enlarged City District,* 637 F. Supp. 1022 (N.D. N.Y. 1986) *Aff'd per curiam,* 820 F.2d 587 (2d Cir. 1987), *cert. den.* 484 U.S. 981 (1987); *Granite School District v. Shannon M.,* 787 F.Supp. 1020; (D. Utah 1992) and *Bevin H v. Wright,* 666 F.Supp. 71 (W.D. Pa. 1987).

Because the question you raise could arise in a variety of factual contexts, OSEP cannot express a view as to whether or not "one-to-one nursing" services are a required related service for an individual disabled student. Rather, the determination as to whether these services are required related services for an individual disabled student must be made on a case-by-case basis, in light of the particular facts and circumstances surrounding the request, by the participants on the student's IEP team. If the student's IEP team determines that nursing services are a required related service for a particular student, those services must be provided at no cost to the parents. Under Part B, a public agency may use funds other than Part B funds, including whatever State, local, Federal, and private sources of support that are available in the State to meet Part B requirements. *See* 34 CFR § 300.301(a)

I hope that this explanation is helpful to you. If we can be of further assistance, please let me know.

Thomas Hehir
Director Office of Special Education Programs

Supreme Court, U.S.
FILED
JUN 18
OFFICE OF THE CLERK

No. 96-1793

In The

Supreme Court of the United States

October Term, 1996

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,

Petitioner,

vs.

GARRET F., A Minor By His Mother and Next Friend, CHARLENE F.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent requests that the Court deny the Petition for Writ of Certiorari seeking review of an opinion in the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

A. Course of Proceedings

The Petitioner, Cedar Rapids Community School District (the District) did file suit in the United States District Court for the Northern District of Iowa which sought to reverse the December 16, 1994, ruling by the Iowa Department of Education that the District was required under both state and federal law to reimburse Charlene F. for the costs of Garret F.'s healthcare costs while attending the District's schools. The Department of Education ruled that the health services needed by Garret F. to allow him to participate in a free appropriate public education constituted "related services" under federal law and "support services" under Iowa law. The Department of Education's ruling was carefully reasoned and findings of facts were made that whether the "bright line" test of *Tatro* was followed or the standards of the cases *Detsel, Bevin H.* and *Shannon M.*[1] were applied, the services were related services under federal law and support services under Iowa law and thus must be provided by the District.

The District chose to appeal this decision to the United States District Court for the Northern District of Iowa rather than state court. 20 U.S.C. § 1415(e). Both parties moved for summary judgment. On March 22, 1996, the United States District Court for the Northern District of Iowa, Honorable

1. *Detsel v. Bd. of Education of Auburn*, 637 F. Supp. 1022 (N.D.N.Y. 1986), *aff'd*, 820 F.2d 587 (2nd Cir.) (per curiam), *cert. denied*, 484 U.S. 981 (1987); *Bevin H. by Michael H. v. Wright*, 666 F. Supp 71 (W.D. Pa. 1987); *Granite School Dist. v. Shannon M.*, 787 F. Supp 1020 (D. Utah 1992).

Edward J. McManus, granted Garret F.'s Motion for Summary Judgment and denied that of the District. The court held that the IDEA required the District to provide the health services. The court stated that: "in accordance with the appropriate standards, in light of *Tatro*, and for the reasons set forth in the ALJ's thorough decision" Garret F.'s motion should be granted. Judgment was entered in favor of Garret F. on March 22, 1996. The District appealed to the United States Court of Appeals for the Eighth Circuit which affirmed on February 7, 1997.

B. Statement of Facts

In 1987, when Garret F. was four years old, he was injured in a motorcycle accident. While his mental abilities were unaffected, he did sustain a spinal cord injury which left him quadriplegic and ventilator dependent. Shortly thereafter he started to attend kindergarten in the District. He has remained in attendance at schools in the District ever since. During the school day he requires a personal attendant within hearing distance of him at all times to see that certain intermittent healthcare needs are met. These needs include: urinary bladder catheterization about once a day; suctioning of his tracheotomy as needed, generally once a day; ambu-bagging administration during suctioning and in the event that his ventilator would malfunction; assistance with food and drink; familiarity with and ability to troubleshoot the ventilator; ability to observe his breathing to determine if air is going into his lungs and the ability to recognize signs of autonomic hyperreflexia; and repositioning. Garret F.'s family provided an attendant to provide these needs from the Fall of 1988 through the Spring of 1993.

The District has, at its expense, provided a teacher's associate who did not provide any nursing assistance or attend to any of Garret F.'s needs set forth above. For the 1988-1989 school year, the needs were provided by Garret F.'s aunt, Stephanie

Madison. Ms. Madison was 18 years old when the school year began and had no registered nurse (RN) or licensed practical nurse (LPN) certification. She had not had any prior nursing experience.

From the Fall of 1989 through the Spring of 1993, the needs were met by an LPN paid by the family. Since the time of the appeal of the 1993 IEP through the present the family continues to pay for these needs either through its own funds or private medical insurance.

Charlene F. asked the District to provide, at its expense, an attendant since the Fall of 1988. The District refused. Following its 1993 refusal, Garret F. filed an appeal with the Iowa Department of Education. The Department, relying on both the IDEA and the Iowa Special Education Laws, conducted a three day hearing, took evidence and ruled in favor of Garret F. It was from this decision that the District appealed.

The evidence is undisputed that none of the required services need to be performed by a physician. A non-certified person or a LPN with appropriate training can perform all the items of care which need to be done for Garret F. while at school. Frey family members provide the same services to Garret F. at night and over the weekends that an LPN provides. Garret F.'s friends provide many of these services to him when they are visiting him at home.

Prior to the trial, the District obtained a ruling from the Iowa Board of Nursing which is discussed at pages 3 and 4 of the Petition for Writ of Certiorari. The ruling was based, at least in part, on a misstatement of Garret's medical condition by the District. Witnesses for the District testified that in documents submitted to the Iowa Board of Nursing they indicated that the stability condition for intervention for

autonomic hyper-reflexia was unstable. Trial Transcript (Tr.) at 75-76; Exhibit (Exh.) 125. In contrast, the unrefuted medical testimony at trial was that the hyper-reflexia condition was stable and that there would be no medical reason to use the term "unstable" to describe the stability of the intervention for autonomic hyper-reflexia. Tr. at 76. Thus, the District's increased cost argument based on the ruling from the Iowa Board of Nursing, appears to be an argument of their own making based upon inaccurate medical information and should be entitled to no weight.

Further, for the 1993-1994 school year, the teaching associate that the District hired was an LPN. Thus, if that individual was to continue and provide the health care services required, there would be no additional cost to the District. If an RN was hired by the District, the teacher associate would not be necessary since the RN could perform all of the services that the teaching associate currently does. Tr. at 278-79. According to the District, the teacher associate's compensation is $9,548 and the cost to hire a first year RN would be approximately $27,981.79. Tr. at 523-25. Thus, even using the District's "worst case scenario", the additional cost to the District would be approximately $17,000 per year. At the time of trial the District received total revenue for Garret F.'s attendance at the District of $12,600. Tr. at 514.

The total funding received by the District for its 17,500 students (before extra money for special education) was $63 million dollars for the 1993-1994 school year. Tr. at 513-14. In addition, the District receives additional funding above and beyond that amount for the 2,200 special education students within the District. Tr. 533-34. The extra special education money which is received is put into a category within the District budget and then subgrouped with other categories. Tr. 534. The District does not limit the expenditure on any specific student for this extra special education funding. Tr. at 604.

The District goes to great lengths to paint a bleak picture of its finances. However, the record in this case is clear that there is no financial impact on the District when it "overspends" its special education budget. When this happens the District incurs what is known as a deficit. Tr. at 588. At this point, the District has three options to correct the deficit. It can petition the School Budget Review Committee to either: (1) tax locally for it; or (2) take it out of the district cash reserve; or (3) receive additional funds from the State of Iowa. Tr. at 588. Even in instances where the special education budget has been overspent all special education budgetary obligations are met. Tr. at 590. During the five years that Dr. Austin Mueller had been in charge of special education, all special education budgetary overrides have been met. Tr. at 590. If the special education budget ends the year in surplus, the surplus money goes back to the State of Iowa and then is redistributed back to districts which have deficits. Tr. at 591-92. There is no spending limit legally imposed upon a school district in regard to an individual student with disabilities. Tr. at 604.

Consistent with the medical evidence that none of the services need to be provided by a physician the District does provide many of the services Garret needs to other students who attend the District including wheelchair confined students: intermittent catheterization, assistance in consuming food and drinking water and beverages, monitoring blood sugar levels for some of its diabetic students, suctioning of tracheotomies, tube feeding, and positioning services. Tr. At 314-15; 332-36; 381-83.

The record at trial was that Districts in states other than Iowa are providing the services which Garret needs to ventilator dependent children with non-licensed personnel. Tr. at 340-41. The District contacted a number of states including Louisiana, Massachusetts, Illinois, Minnesota and New Mexico

and determined that other states provided a whole gamut of care through non-licensed personnel ranging up to registered nurses. Tr. at 341-43. This included non-licensed, non-professional personnel. Tr. at 364-65.

C. Perceived Misstatement of Fact in Petition

Garret F. believes several factual misstatements need to be addressed.

At page 6 of the Petition for Writ of Certiorari the District states "the Eighth Circuit has relieved from responsibility those who would traditionally bear these expenses and shifted the burden onto already under-funded public school districts." In contrast, the factual record at trial is that the District had adequate funding to pay for the services required by the Eighth Circuit whether these were performed by an LPN at a reduced cost or an RN at a slightly higher cost. Tr. at 588-92.

At page 7 of the Introduction the District claims "the services here fall well outside the range of traditional school nursing services." In contrast, the factual record at trial confirmed that school nurses for the District have performed virtually all of the services required by Garret F. and continue to perform them for other students within the District. Tr. at 314-15; 332-36; 381-83.

On page 8 the District again makes the broad statement that "overburdened school districts throughout the country may have to redirect significant portions of their budgets to handle these catastrophic medical expenses." This is in direct contrast to the record in this case which was that the District had more than enough money to perform and supply the services at issue. Tr. at 588-92. Likewise, on page 17 the District makes broad generalizations that the "costs are staggering" for the services at

issue. In contrast, the factual record in this case was that the additional expense, if any, would be $17,000 per year. Tr. at 523-25; Appendix C at 36a. Further, there was evidence that other school districts are providing these services with a range of health care professionals at their own expense. Tr. at 341-43; 364-65.

REASONS FOR DENYING THE WRIT

I.

THE JUDGMENT IN FAVOR OF GARRET F. WOULD BE AFFIRMED EVEN IF THE EIGHTH CIRCUIT'S USE OF AND APPLICATION OF *TATRO* WAS IN ERROR.

The Petition for Writ of Certiorari should be denied for several reasons. First, the decision of the Administrative Law Judge was based both on state and federal law. It was also based on a series of fact findings that the needed services are "related services" under federal law whether or not the "bright line" rule was employed or not. The well-established rule in the Eighth Circuit Court of Appeals is that the Court can affirm on any grounds supported in the record even if not addressed or relied upon by the Federal District Court. *See, e.g., Smith v. Copeland*, 87 F.3d 265, 267-68 (8th Cir. 1996); *O'Hagan v. United States*, 86 F.3d 776, 779 n.2 (8th Cir. 1996); and *Phillips v. Marist Society of Washington Prov.*, 80 F.3d 274, 275 (8th Cir. 1996).

This well-established rule applies in the United States Supreme Court as well. *United States v. Carignan*, 342 U.S. 36, 38-39, 72 S. Ct. 97, 96 L. Ed. 48, 50-51 (1951); *Thigpen v. Roberts*, 468 U.S. 27, 28, 104 S. Ct. 2916, 82 L. Ed. 2d 23, 28 (1984). In *Thigpen*, the Supreme Court stated:

> Although the court below and the petition for certiorari addressed only the double jeopardy issue, we may affirm on any ground that the law and the record permit and that will not expand the relief granted below.

468 U.S. at 29-30 (citing *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8, 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977)).

In *New York Telephone Co.*, the Supreme Court stated:

> We have the discretion to consider [issues not even encompassed with the question posed in the Petition for Certiorari] because the prevailing party may defend the judgment on any ground which the law and the record permit that would not expand the relief it has been granted.

434 U.S. at 166 n.8, 54 L. Ed. 2d at 385 (citing *Langnes v. Green*, 282 U.S. 531, 538-39, 51 S. Ct. 243, 75 L. Ed. 520 (1931)).

Judgments, such as the present one, which are sustainable on non-federal grounds should result in a denial of a Writ of Certiorari. *See, e.g., Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 488-89, 13 L. Ed. 2d 439, 441-42, 85 S. Ct. 593 (1965); *Wilson v. Loew's Inc.*, 355 U.S. 597, 598, 2 L. Ed. 2d 519, 521, 78 S. Ct. 526 (1958).

A case which compels denial of certiorari in this case is *SS Monrosa v. Carbon Black Export Inc.*, 359 U.S. 180, 3 L. Ed. 2d 723, 79 S. Ct. 710, *reh. den.*, 359 U.S. 999, 3 L. Ed. 2d 986, 79 S. Ct. 1115 (1959).

The *SS Monrosa* case involved a libel in admiralty in the United States District Court for the Southern District of Texas. 359 U.S. at 181, 3 L. Ed. 2d at 724.

The Court enunciated an important rule which applies in this case:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly.

359 U.S. 184, 3 L. Ed. 2d at 726.

In this case, it is clear that the administrative law judge found in favor of Garret F. on both state and federal grounds. The state grounds were pursuant to Iowa Code § 256B.2 (1993) and relevant Iowa Administrative Code provisions. Apx. C. The District Court adopted the "reasoning of the ALJ" and ruled in favor of Garret F. on federal grounds both under a *Tatro* and non-*Tatro* approach.

The Eighth Circuit ruled in favor of Garret F. on the grounds of *Tatro* only. The non-*Tatro* federal grounds and the state court grounds remain in support of the Circuit's ruling and serve as justification to deny certiorari in this case.

II.

THE EIGHTH CIRCUIT RULING CLEARLY FOLLOWS AND APPLIES *TATRO* AND DOES NOT CREATE AN ILLOGICAL DEFINITION OF MEDICAL SERVICES.

Contrary to the assertion of the District, the Court of Appeals' ruling does nothing more than apply and enforce the plain language of *Tatro* and 20 U.S.C. § 1401(a)(17).

The Eighth Circuit has not "shifted" any responsibility in this case. In contrast, it is requiring the District to use its substantial resources to provide needed related services under federal law for Garret F. to receive a free, appropriate public education. The District's attempt to plead poverty is not a matter of record in this case and should not be countenanced.

It should also be noted that in *Detsel v. Sullivan* (Detsel II), 895 F.2d 58, 59 (2nd Cir. 1990) the funding issue the District relies on was mooted for many, if not most, students when the United States Court of Appeals for the Second Circuit ruled Melissa Detsel was entitled to Medicaid payment for private-duty nursing while attending public school.

Respondent does concede that the Eighth Circuit's ruling, which follows *Tatro*, is in conflict with rulings of the Sixth and Ninth Circuits which failed to follow *Tatro*. It is also in conflict with a District Court decision in New York which was affirmed per curiam by the Second Circuit, *Detsel v. Board of Education of Auburn*, 820 F.2d 587 (2nd Cir. 1987).

Further, in contrast to the assertion on page 7 of the Petition, the record clearly establishes that the services here do not fall outside the range of traditional school nursing services. In fact,

virtually all of the services are currently being provided to other students within the District. While the Petitioner "demands this Court's immediate review" the fact of the matter is that other school districts are providing similar services at public expense. Tr. at 341-43; 364-65.

The purpose of the IDEA "was to rectify discrimination suffered by children with disabilities at the hands of public schools." *Conner v. Branstad*, 839 F. Supp. 1346, 1358 n.22 (S.D. Ia. 1993). Thus, the IDEA must "be broadly applied and liberally construed in favor of providing free and appropriate education to handicapped students." *S-1 v. Turlington*, 635 F.2d 342, 347 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030.

Under Federal law, special education and related services are to be provided to the maximum extent appropriate with children who are non-disabled. 20 U.S.C. § 1412 (1993); 34 C.F.R. § 300.550. Iowa law provides that:

> to the maximum extent possible, children requiring special education shall attend regular classes and shall be educated with children who do not require special education. Whenever possible, hindrances to learning and to the normal functioning of children requiring special education within the regular school environment shall be overcome by the provision of special aids and services rather than by separate programs for those in need of special education. Special classes, separate school or other removal of children requiring special education from the regular educational environment, shall occur only when, and to the extent that the nature or severity of the

> educational handicap is such that education and regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily.

Iowa Code § 256B.2(3) (1993).

In *Independent School District v. Tatro*, 468 U.S. 883, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984) the Supreme Court applied a two part inquiry to determine whether a given service is a related service under the IDEA: (1) is the supportive service necessary to enable a handicapped child to benefit from special education; (2) is the service excluded by the act as a "medical service" aside from any diagnostic or evaluation purpose. 468 U.S. at 890, 104 S.Ct. at 3375. There is no question that both elements are met here and the services needed are related services under the IDEA.

Under the bright line rule and holding of *Tatro*, in this case the services are related services and not medical services. In *Tatro*, the Court addressed and rejected a school district's claim that it had no responsibility to administer intermittent catheterization because it constituted a medical service. 104 S. Ct. at 3374. The United States Supreme Court determined that catheterization was a related service because it enabled a handicapped child to remain at school during the day and, thus, have meaningful access to education. *Id.* at 3377. The United States Supreme Court also determined that catheterization did not fall under the medical treatment exclusion of the statute or the Federal Department of Education's Rules. *Id.* It affirmed the Department's interpretation through ruling making that services of a school nurse would be required as a related service while treatment by a physician could be excluded. Dr. Reinertson's uncontroverted testimony that none of the services Garret needs require a physician means they are related services under *Tatro*.

In dicta, which later cases improperly extrapolated, the Court noted that a distinction between nursing services and treatment by a physician as a related service was reasonable. Part of the reasonableness was concluded to be a consideration of differentiation of costs between nursing and physician services and the fact that school nurses "have long been a part of the education system." *Id.* at 3378.

The Supreme Court did not say that cost was a factor to be considered by courts. It merely stated that Congress and the Department of Education may have used expense, as well as limitations of educators' expertise in medical matters, for making a distinction between nursing services and physician treatment as a related service. The Supreme Court expressly rejected the school's argument that services provided in accordance with a physician's prescription and general supervision fell within the medical treatment exclusion. It noted that nurses in the school were authorized to dispense medications and administer emergency injections to non-disabled students in accordance with a physician's prescription. *Id.* Thus, in *Tatro*, the Supreme Court affirmed a Congressional and administrative distinction between nursing services and medical treatment as a related service under the IDEA.

In contrast, the District's position is based on decisions from within the Second, Sixth and Ninth circuits. The logical problem with decisions such as these was well stated in *Macomb Co. School District v. Joshua S.*, 715 F. Supp. 824 (E.D. Mich. 1989):

> The difficulty the Court has with both *Detsel* and *Bevin* are their failure to adhere to certain principles developed in *Tatro*. Due to this failure, the decisions are not entirely clear as to whether the disputed services were

rejected as not representing "supportive services" under the EAHCA, or whether they fell within the "medical services" exclusion. Rather, *Detsel* concludes that while the disputed services did not actually meet the statutory and regulatory definition of medical services, given the regulation specifically addresses physician-performed services, denying the services "is in keeping with [the regulation's] spirit." 637 F.Supp. at 1022. The Court, however, believes that this conclusion ignores the spirit of the EAHCA itself. As *Tatro* repeatedly stressed, the reason for mandating the provision of supportive services under the EAHCA, is to guarantee handicapped students an opportunity to gain an education. If granting such an opportunity entails furnishing medically-related services short of requiring a licensed physician, we believe such services are the student's right. Moreover, the EAHCA, its legislative history, and its regulations are void of any suggestion that states are free to decide, on the basis of the cost and effort required, which related services fall within the medical services exclusion. The Court therefore rejects *Detsel*'s conclusion that services provided by a nurse, no matter how comprehensive, are medical services entitled to exclusion under the EAHCA.

Bevin reaches its result by holding that related services are only those that are "within reason," and that the proper determination involves a balancing of factors. Yet, *Bevin*'s

reliance on *Dept. of Educ., State of Hawaii v. Katherine D.*, 727 F.2d 809 (9th Cir. 1984), for this proposition is misplaced. In holding that a school district need only provide services within reason, *Katherine D.* was responding to the question of whether the EAHCA must provide a handicapped student "the best possible education." 727 F.2d at 813. This inquiry is entirely separate from the inquiry concerning the services necessary to provide a child "with meaningful access to education. . . ." *Tatro*, 468 U.S. at 891 (emphasis supplied). Certainly, the issue of the level of education required under the EAHCA will raise questions of balance. Yet, once a district determines the appropriate education, the problem of access must be examined within the framework supplied in *Tatro*. For this reason, we find *Bevin* of marginal precedential value.

It also should be noted that the dicta relied on by *Bevin H.* and *Detsel* "unduly expensive *and* beyond the range of their competence" is a two-pronged dicta, the later of which appears to have been overlooked by the District. In this case the evidence established that the services required are within the competence of the school nurses.

The District's statement that a "consensus" exists (page 12) omits any serious discussion of cases which find similar services to be related services: *Joshua S.; Tokaricik v. Forest Hill School District*, 665 F.2d 443 (3rd Cir.), *cert. denied*, 73 L. Ed. 2d 1383 (1981) (catheterization found to be a related service); *Dept. of Education v. Katherine D.*, 727 F.2d 809, 813 (9th Cir. 1984)

(tracheotomy care held to be a related service); Digest of Response, 20 IDELR at 174-75 (declaring the training on reversing a pattern associated with aspirating during feeding would be the responsibility of the education community); *Special School Dist. No. 6, St. Paul, Minn.*, 23 IDELR 119, 131 (1994) (both parties assume that tracheal suctioning must be provided by the district as a related service within the framework of providing a free, appropriate public education in the least restrictive environment, and the crux of the dispute is where and by whom people should be suctioned).

Another case bearing on the *Tatro* bright line rule is *Max M. v. Thompson*, 592 F. Supp. 1437, 1445 (N.D. Ill. 1984) (which held that psychotherapy, a recognized "related service" was not excluded even though in that case it was provided by a licensed physician). Psychotherapy and similar psychological services that other professionals can provide are required under § 1401(a)(17) and do not become non-reimbursable by virtue of their being performed by a psychiatrist. *Id.*

The logic of the district's cost-based approach collapses when it is considered that the "related services" identified in the Act includes such costly services as speech pathology and audiology, psychological services, physical and occupational therapy, recreation, medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only. 20 U.S.C. § 1401(a)(17).

With respect to *Rowley*, it should be noted that the history of the IDEA is discussed including the Congressional Findings: Congress found that of the roughly 8 million handicapped children in the United States at the time of enactment, 1 million were "excluded entirely from the public school system" and more than half were receiving an inappropriate education. 458 U.S. at 189, 73 L. Ed. 2d at 701. That is precisely the case here

on the unrefuted record. In other words, if the services are not received, Garrett F. will not be able to attend school. (Tr. at 596-97).

The District's arguments concerning *Rowley*, a 1982 Supreme Court case, are not persuasive. First, *Rowley* preceded *Tatro* by two years and the opportunity Garrett F. seeks in this case is merely to get in the front door of the school and survive for the school day. He is not seeking some ultimate level of educational experience. The whole purpose of the IDEA is to make public education available to handicapped children and to make such access meaningful. *Tatro*, 468 U.S. at 891, 82 L. Ed. 2d at 672; *Rowley*, 458 U.S. at 192. "A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned." *Tatro*, 468 U.S. at 891, 82 L. Ed 2d at 672.

The District's argument at page 12 of its Petition on "shades of difference in the reasoning of these opinions" is not supported by the record in this case. For example, the District states "others emphasize the legal burden of being responsible for continuous, life-sustaining care." The District specifically disavowed this as a substantial basis for its position and placed it in terms of the liability for using a non-licensed provider, not liability for providing the services. (Tr. at 568-71). The third distinction distilled by the District, "still others highlight the gap between the services sought by the disabled child's parents and the 'school nursing services' traditionally provided by schools" is also without merit since as shown above, virtually all of the services have been provided and are being provided to other students in the District.

That leaves "a focus on the school's financial burden" as the only "shade of reasoning" left for the District. As set forth above, this ground fails based on the factual record in this case.

The Districts' citation to, Appendix D, a letter from the OSEP, adds little to the analysis other than the OSEP itself was unable to lay down a guideline applicable to all cases after considering the issue for two and a half years.

Finally, the District's argument on adverse policy consequences is not well-founded. The District again makes a number of unsupported assumptions in its cost arguments. First, it states that there are a "number of seriously disabled children" which would cause staggering costs. By contrast, the record in this a case is that the costs were de minimus and that there was only one other ventilator dependent child preparing to enter the district. (Tr. at 322). In fact, the District stated, "We're hoping to get him into the district." (Tr. at 322). There was no discussion as to the source of funding for that child. Again, the District complains of "tight budgets" and "limited sources of financing" without any support on the record. *See also Cremeans v. Fairland Local School District*, 91 Ohio App. 3d 668, 633 N.E. 2d 570 (Ohio App. 1993) (placement with $94,000 annual cost-out of $572,000 budget — required under IDEA).

The argument on page 18 concerning state sovereignty and states' rights raises a constitutional question that has not previously been addressed nor raised in this case. It could not possibly serve as an issue justify a grant of a Writ of Certiorari.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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OCTOBER TERM, 1997

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,
PETITIONER

v.

GARRET F., A MINOR BY HIS MOTHER AND
NEXT FRIEND, CHARLENE F.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, requires States receiving federal special education funds to provide special education and "related services" to students with disabilities. "Related services" are defined to include supportive services that are required to assist a child with a disability to benefit from special education, but exclude "medical services" unless they are for diagnosis or evaluation. 20 U.S.C. 1401(a)(17).

The question presented is:

Whether the Secretary of Education's "related services" regulation, 34 C.F.R. 300.16, reasonably interprets the "medical services" exclusion to exclude only services provided by a physician, and not health services provided by a qualified school nurse or other qualified non-physician.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1793

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT, PETITIONER

v.

GARRET F., A MINOR BY HIS MOTHER AND NEXT FRIEND, CHARLENE F.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States Department of Education has responsibility for the administration and enforcement of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. 1413(c), 1416(a), 1417(b), 1420. In response to the Court's invitation, the United States filed a brief as amicus curiae at the petition stage in this case.

STATEMENT

1. a. Respondent is a student in the petitioner school district. He was severely injured in an accident in 1987, when he was four years old. Pet. App. 9a, 19a.[1] The accident left him paralyzed from the neck down. Respondent has com-

[1] Our factual statement includes facts set forth in the decision of the Iowa state administrative law judge (ALJ), as well as the record before the ALJ. Neither party introduced any additional evidence before the district court. The ALJ's factual findings are treated as correct in petitioner's submissions to this Court and are entitled to due weight. See *Board of Educ. of Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 206 (1982).

plete head movement, has normal mental capacity, is able to speak, is able to operate his motorized wheelchair through use of a puff and suck straw, and is able to control his computer through the use of a device attuned to his head movements. *Id.* at 9a, 19a; Tr. 29, 84-85, 291-292. Respondent is "academically successful in school" and, at the time of the administrative hearing, his most recent report card included several A's, one B-plus, and one C. Pet. App. 19a. Respondent is knowledgeable about his health care and is able orally to instruct others about his needs. *Id.* at 20a; Tr. 79-80, 85, 463.

Respondent's respiratory muscles are paralyzed, so that he needs external aids to breathe, usually an electric ventilator. Pet. App. 19a, Tr. 41. The ventilator is connected to a tube inserted into an incision in his trachea (a tracheotomy tube). Tr. 332. From time to time, it is necessary to suction respondent's lungs through the tube to remove secretions that would normally be discharged by swallowing or coughing; the ventilator signals when that is necessary. Tr. 37. During the suctioning process, and during any other period when the ventilator is not functioning, air must be pumped in manually through an air bag attached to the tracheotomy tube. Pet. App. 19a, 24a. That suctioning and bagging are simple processes regularly performed by respondent's friends and family. Pet. App. 21a; Tr. 32, 176-177.

When respondent is not at school, his health care is provided during the day and on weekends by family members and friends who are familiar with his needs. Pet. App. 21a. On week nights, a health care provider is in respondent's home during the sleeping hours to attend to his needs, including turning him in his sleep every two hours. *Ibid.* That health care provider is a licensed practical nurse (L.P.N.) who is supervised by a registered nurse (R.N.) who is not on site. *Ibid.*

b. In the fall of 1988, respondent began attending school in the petitioner school district. Pet. App. 19a, 23a. Respondent needs special assistance with his education program and with health matters in order to benefit from that education program. Pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, Iowa receives federal special education funds and is, therefore, required to provide "special education and related services" to respondent and other students with disabilities. 20 U.S.C. 1400(c). "[R]elated services" are defined by statute to include supportive services that are required to assist a student with a disability to benefit from special education, but exclude "medical services" unless they are for diagnosis or evaluation. 20 U.S.C. 1401(a)(17).

Petitioner provides respondent special education and certain related services, including special assistance through a one-on-one teacher associate who continuously helps with respondent's needs such as page turning, note taking, computer set up, transporting of books, and maneuvering about the school building; special transportation services; and occupational therapy. Pet. App. 27a, 58a; Tr. 29-30. And petitioner provides devices, such as a computer, special software, and other instructional materials, that serve respondent's unique educational needs. Pet. App. 27a; Pet. 3. Petitioner does not dispute its statutory responsibility to provide the foregoing services.

In 1993, when respondent was about to start fifth grade, his family requested that the petitioner school district, pursuant to its obligations under IDEA and Iowa special education law, provide respondent certain health services that he needs in order to assist him to benefit from special education.[2] Respondent requested that petitioner make

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[2] In earlier years, respondent's parents apparently had made similar requests that had been denied, Pet. App. 23a, Tr. 94-95, 637-638, and the family had managed to pay for the health services through a combination of a settlement fund from respondent's accident and insurance policies (of which one ceased payment because the coverage limit was reached and an-

available someone to be in the vicinity of respondent: to assist with the ventilator management as described above; to assist with urinary bladder catheterization once a day; to suction respondent's tracheotomy tube as needed (or once every six hours); to get respondent into a reclining position for five minutes of each hour; and to be available for emergency procedures in the unlikely event respondent experiences autonomic hyperreflexia. Pet. App. 20a.[3] Respondent has never needed emergency care at school. *Id.* at 23a; Tr. 392.

Petitioner refused to pay for the requested health services. Although an individualized education program (IEP) was developed for respondent as required by IDEA,[4] school district staff members declined to include the requested services as part of that IEP, based "on advice from legal counsel" that the services were excluded "medical services" rather than "related services." Pet. App. 25a; Tr. 512, 524, 568-569; Exh. 93 at 390.

2. Respondent pursued an administrative appeal and, after a three-day evidentiary hearing, an Iowa state administrative law judge (ALJ) ruled in his favor. Pet. App. 17a-63a. The Iowa ALJ held that the health care services required by respondent are "related services" which must be

other has an annual coverage limit that is normally exceeded by mid-year), Pet. App. 20a-21a.

[3] The ALJ found that autonomic hyperreflexia is an adverse reaction to anxiety or a full bladder that affects blood pressure and heart rate; respondent has experienced autonomic hyperreflexia rarely, and never at school, and it has usually been alleviated by catheterization. Pet. App. 20a.

[4] In States receiving IDEA funds (which as of August 1998 includes all States), each child with a disability must receive an "individualized educational program" (IEP) each year designed by a team that includes school representatives and parents. The team determines what services a child requires to receive a "free appropriate public education" in a regular education environment "to the maximum extent appropriate." 20 U.S.C. 1401(a)(18) and (20), 1412(5)(B), 1414(a)(5); *Honig* v. *Doe*, 484 U.S. 305, 311 (1988); *Rowley*, 458 U.S. at 181-182, 202.

provided by the district and not "medical services" excluded from that requirement by IDEA under 20 U.S.C. 1401(a)(17). Pet. App. 52a. The ALJ relied on *Irving Independent School District* v. *Tatro*, 468 U.S. 883 (1984), in which "the Court affirmed a Congressional and administrative distinction between nursing services and medical treatment as a related service" under IDEA. Pet. App. 43a. *Tatro* applied the Secretary's regulation providing that "the services of a school nurse could be required as a related service, and treatment by a 'licensed physician' could be excluded" under IDEA as a "medical service," finding that the regulation was a reasonable interpretation of the statute. *Id.* at 42a, 44a. The ALJ noted that *Tatro* did not treat expense, or the extent of the services required, as a factor for courts to consider. *Id.* at 42a. The ALJ ruled that a service is an excluded "medical service" if "the service '*must* be performed by a physician.'" *Id.* at 51a (quoting *Tatro*, 468 U.S. at 894). Applying that standard, the ALJ determined that the health care services required by respondent at school can be "provided by a 'qualified school nurse or other qualified person' and are thus 'school health services' required by IDEA as a related service." Pet. App. 52a.

Furthermore, the ALJ ruled that, even under the multifactor test applied by some courts that weighs expense, burden, extent and nature of the services, the health care services required by respondent are "related services" under IDEA. Pet. App. 52a.[5] The ALJ noted that the services

[5] The cost of the required services depends primarily on the licensure of the person providing them, *i.e.*, a registered nurse (R.N.) is more expensive than a licensed practical nurse (L.P.N.) or a nonlicensed trained care provider. See Pet. App. 34a-36a. The parties agree that the services at issue need not be provided by a physician, but disagree regarding whether an R.N., an L.P.N., or a trained care provider is required. *Id.* at 20a. Petitioner contended below that an R.N. was required, but the Iowa Board of Nursing ruling on which petitioner relied was changed at petitioner's request following its loss below. See U.S. Amicus Br. on Pet. 9-10.

needed by respondent are similar to services already provided to other students in petitioner's school district—petitioner provides other students urinary catheterization, help with food and drink, oxygen supplement positioning, tracheostomy suctioning and bagging. The only service needed by respondent and not already provided by the school to other students is the monitoring of his ventilator. *Id.* at 53a. Finally, the ALJ held that "even if federal law did not require school health care services for [respondent], state law does." *Id.* at 58a; see also *id.* at 54a-55a. Thus it ordered petitioner to reimburse respondent for health-care costs incurred for the 1993-1994 school year. *Id.* at 63a.

3. Petitioner filed suit in federal district court pursuant to 20 U.S.C. 1415(e)(4) and 28 U.S.C. 1367, challenging the ALJ's decision on both state and federal grounds. Pet. App. 9a. On cross-motions for summary judgment, the district court affirmed the ALJ's determination, "[i]n accordance with the appropriate standards, in light of *Tatro*, and for the reasons set forth in the ALJ's thorough decision." *Id.* at 15a. The court ruled that the needed services were not excluded "medical services" under IDEA, but instead required "related services." *Id.* at 11a-15a. The court did not address the state law issues. *Id.* at 15a.

4. The court of appeals affirmed. Pet. App. 1a-7a. After finding that the services respondent requires "qualify as supportive services necessary to enable him to enjoy the benefit of special education" and that such services need not be provided by a physician, it held that they are "related services" which petitioner is required to provide. *Id.* at 6a. It explained that *Tatro* "established a bright-line test: the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not." *Ibid.* While acknowledging that its reading of *Tatro* conflicts with that of other circuits, it "decline[d] to seize dicta in *Tatro* to go beyond the

physician/non-physician test which the Supreme Court sets forth therein." *Id.* at 7a.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, requires that States receiving federal special education funds provide special education and "related services" to students with disabilities. "[R]elated services" are defined to include supportive services that are required to assist a child with a disability to benefit from special education, but exclude "medical services" unless they are for diagnosis or evaluation. 20 U.S.C. 1401(a)(17). The Secretary of Education properly interprets the term "medical services" in this context to mean only services provided by a physician, and not school health services that can be provided by a non-physician. That interpretation is supported by the plain language of the statute.

The Secretary of Education is authorized by Congress to issue regulations as necessary to carry out the requirements of IDEA, and his interpretation of the statutory term is entitled to administrative deference for that reason. Moreover, that interpretation is additionally entitled to respect because Congress ratified it when, in 1982, Congress opposed the then-Secretary's attempt to expand the medical services exclusion and to restrict the related services provision. And, in 1983, Congress enacted Section 6 of the Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, 97 Stat. 1357, 1359 (codified as amended, 20 U.S.C. 1407(b)), which prohibits the Secretary from implementing any regulation that would lessen the protections afforded children with disabilities under IDEA, as embodied in the Secretary's regulations then in effect, unless such new regulation reflects the clear and unequivocal intent of Congress in legislation. Thus, petitioner's attempt to construe the "medical services" exclusion to depend on factors such as cost is, in

essence, an effort to obtain through the courts what Congress rejected.

Petitioner's arguments concerning the financial burden it claims would be imposed by affirmance of the court of appeals' judgment ignore the steps Congress has taken to ensure that other federal and state sources assist local school districts to pay the costs of related services for many students.

ARGUMENT

THE SECRETARY OF EDUCATION'S REGULATION CORRECTLY INTERPRETS THE "MEDICAL SERVICES" EXCLUDED FROM COVERAGE UNDER IDEA TO BE SERVICES THAT MUST BE PROVIDED BY A PHYSICIAN

A. The Plain Language Of IDEA Shows That Excluded "Medical Services" Are Services Provided By A Physician And Not Health Services Provided By Non-Physicians

1. The central purpose of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, is to ensure that children with disabilities have available to them a "free appropriate public education" (FAPE) which includes "special education and related services designed to meet their unique needs." 20 U.S.C. 1400(c).[6] In order to qualify

[6] The statute originally was entitled the Education of the Handicapped Act (EHA), Pub. L. No. 91-230, 84 Stat. 175 (1970), and has since been amended on numerous occasions, including when Congress enacted the Education for All Handicapped Children Act of 1975 (EAHCA) to amend the EHA in significant respects, and to define, for the first time, the terms "special education" and "related services." Pub. L. No. 94-142, 89 Stat. 773, 775. In 1990, Congress changed the title of the statute to the Individuals with Disabilities Education Act (IDEA). Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a)(1) and (3), 104 Stat. 1103, 1141, 1142 (1990 Amendments). Most recently, Congress reauthorized and amended IDEA on June 4, 1997. See Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997 Amendments). For a more detailed history of the statute's early evolution, see *Rowley*, 458 U.S. at 179-180.

for assistance under IDEA, a State must demonstrate to the Secretary of Education (Secretary), *inter alia*, that it has in effect "a policy that assures all children with disabilities the right to a free appropriate public education," 20 U.S.C. 1412(1), and "procedures to assure that, to the maximum extent appropriate, children with disabilities, * * * are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," 20 U.S.C. 1412(5)(B).

Congress defined FAPE to mean "special education and related services" that meet certain standards and are "provided at public expense, under public supervision and direction, and without charge." 20 U.S.C. 1401(a)(18). "[S]pecial education" is defined as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability," including instruction in classrooms, the home, hospitals and other settings. 20 U.S.C. 1401(a)(16). "[R]elated services" are:

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identi-

fication and assessment of disabling conditions in children.

20 U.S.C. 1401(a)(17).[7]

The term "related services" is not limited to the services enumerated in the statute as "other supportive services," as is plain from the fact that Congress introduced that list by use of the term "including." See *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 n.9 (1985); *American Surety Co.* v. *Marotta*, 287 U.S. 513, 517 (1933). On its face, the statute requires States to provide as "related services" all services "as may be required to assist a child with a disability to benefit from special education," with the single exception of nondiagnostic and nonevaluative medical services. 20 U.S.C. 1401(a)(17).

It is undisputed that the services at issue in this case are required to assist respondent to benefit from his special education program. The services "fall squarely within the definition of a 'supportive service'" for the same reason that catheterization did in *Irving Independent School District* v. *Tatro*, 468 U.S. 883 (1984): because without the services respondent "cannot attend school and thereby 'benefit from special education.'" 468 U.S. at 890; Pet. App. 59a ("If the District refuses to provide health care and the family can't provide it," the "only apparent alternative is a homebound program."); Tr. 87, 637-638, 661. As the *Tatro* Court explained, "[s]ervices * * * that permit a child to remain at

[7] The statutory provisions at issue in this case have been altered only slightly during the course of the various statutory amendments described in note 6, *supra*. See, *e.g.*, 1990 Amendments, § 101(c), 104 Stat. 1103 (adding "therapeutic recreation," "social work services," and "rehabilitation counseling" as examples of supportive services that are included under the "related services" definition); 1997 Amendments, § 101, 111 Stat. 45 (adding "orientation and mobility" to the listed examples of supportive services). Unless otherwise noted, we cite to the 1994 codified version of IDEA in effect before the 1997 amendments and during the year for which respondent sought payment from petitioner for the challenged services.

school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school," all of which are required by IDEA. 468 U.S. at 891.

2. Petitioner contends that the services respondent requires are not "related services" under IDEA because they fall within the exception carved out by Congress for "medical services." In defining "related services" Congress listed, as an example, "medical services, except that such medical services shall be for diagnostic and evaluation purposes only." 20 U.S.C. 1401(a)(17). It is undisputed that the services at issue here are not for diagnosis or evaluation. Therefore, if they are "medical services," they are not "related services" under IDEA.

Congress did not define the term "medical services" in IDEA. Thus, we start with the "'ordinary, contemporary, common meaning.'" *Walters* v. *Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997). The adjective "medical" is commonly understood to mean "of, relating to, or concerned with physicians or with the practice of medicine often as distinguished from surgery." *Webster's Third International Dictionary* 1402 (1986). For example, a person who goes to "medical school" is understood to be training to be a physician. In most States, the "Medical Practice Act" regulates physicians and generally bars anyone but physicians from "practicing medicine." See generally Federation of State Medical Boards of the United States, *A Guide to the Essentials of a Modern Medical Practice Act* (1985), *reprinted in Medical Malpractice: Hearings Before the Subcomm. on Health & the Env't of the House Comm. on Energy & Commerce*, 99th Cong., 2d Sess. 393-421 (1986). Iowa, for example, has a "Board of Medical Examiners" to license and regulate physicians, and a "Board of Nursing" to license and regulate nurses. See Iowa Code Ann. 148.1-148.13, 152.1-152.12 (West 1997).

Petitioner suggests (Br. 14-15, 34) that the statutory language should be interpreted not according to its plain meaning but instead according to a five-factor test; in determining whether services are "medical," courts should consider whether they are complex, continuous, outside the capabilities of existing school health personnel, expensive, or likely to have serious repercussions when improperly performed. That five-factor test finds no support in the statutory language. Moreover, each of the factors is contradicted by the examples of "related services" contained in the statute, or otherwise indisputably included among the services that schools must provide.

Many of the "related services" expressly listed in the statute, including "psychological services" and "physical and occupational therapy," may vary widely in complexity depending on the needs of the student receiving the services. 20 U.S.C. 1401(a)(17). Yet the statute is correctly interpreted to require provision of those services regardless of complexity otherwise the "cardinal principle of statutory construction" would be violated by not giving effect to every word of the statute. *Bennett* v. *Spear*, 117 S. Ct. 1154, 1166 (1997); *United Food and Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 517 U.S. 544, 550 (1996).

So too, numerous continuous services are indisputably required by IDEA. Congress heard testimony about the provision of continuous services to children with various disabilities during the legislative proceedings surrounding enactment of the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (EAHCA), which defined "related services" for the first time.[8] Indeed, petitioner does not contest (Br. 5, 6-7, 19) that IDEA requires it to provide a full-time one-on-one associate to help respondent move about the building, turn pages, and manipulate other materials. Exh. 91 at 364; Pet. App. 27a; see also Tr. 546.

Persons other than existing school health personnel are often needed to provide many of the related services expressly listed in the statute including "speech pathology and audiology, psychological services, [and] physical and occupational therapy." 20 U.S.C. 1401(a)(17). As this Court recognized in *Tatro*, "Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as 'trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel.'" 468 U.S. at 893, quoting S. Rep. No. 168, 94th Cong., 1st Sess. 33 (1975).

Congress recognized that providing a free appropriate public education under IDEA would be costly. "There is no doubt that Congress has imposed a significant financial burden on States and school districts that participated in IDEA." *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 15 (1993). In enacting the EAHCA in 1975, Congress understood that, on average, special education and related services for a child with a disability cost two to three times more than a regular education. H.R. Rep. No. 332, 94th Cong., 1st Sess. 12 (1975). That ratio has remained constant over the ensuing 20 years. See S. Chaikind et al., *What Do We Know About the Costs of Special Education? A Selected Review*, 26 J. Spec. Educ. 344, 344-345 (1993).[9] The text and

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[8] See 121 Cong. Rec. 23,707 (1975) (statement of Rep. Quie) (readers for blind children); *Financial Assistance for Improved Educational Services for Handicapped Children: Hearings Before the Select Subcomm. on Educ. of the House Comm. on Educ. & Labor*, 93d Cong., 2d Sess. 261 (1974) (ratio of one-to-one may be required for most severely handicapped); *Education for All Handicapped Children, 1973-1974: Hearings on S. 6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Public Welfare*, 93d Cong., 1st Sess., Pt. 1 at 1467 (1973) (one to one relationship required in some instances).

[9] The costs of IDEA services should be viewed comparatively. If a child with a disability cannot receive the free appropriate public education he requires at school, then the school district will have to provide it in a home or an institutional setting. It thus could be necessary for school

history of the statute show that Congress addressed cost concerns through other provisions of IDEA, and not by excluding related services on the basis of cost. See pp. 24-30, *infra*.

Finally, services that can have catastrophic consequences when improperly performed are indisputably included among the related services required by IDEA. The statute expressly lists psychological services, which can, in the case of a suicidal child, have extremely serious consequences. And catheterization—the service held to be a non-medical related service in *Tatro*—can lead to death if improperly performed. See *Lee* v. *Andrews*, 545 S.W.2d 238 (Tex. Civ. App. 1976).

Thus, none of petitioner's "factors" was intended or understood by Congress to be a basis for excluding services from IDEA's "related services" requirement. Neither alone nor in combination can those factors transform a nonmedical "related service" into an excluded "medical service."

3. Petitioner attempts (Br. 20-21) to find in this Court's precedents a general principle that statutes enacted pursuant to Congress's power under the Spending Clause, U.S. Const., Art. I, § 8, Cl. 1, should be construed to minimize the costs imposed on States, citing, *inter alia*, *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), and *Gebser* v. *Lago Vista Indep. Sch.Dist.*, 118 S.Ct. 1989 (1998), but it is mistaken. There is nothing in those cases to suggest that, when it is clear that Congress intended to impose privately enforceable obligations on recipients of federal funds to provide special education and related services, the scope of those obligations should be determined by anything other than normal rules of statutory construction. *Tatro*, 468 U.S.

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districts to pay for a one-on-one teacher to teach the child in his home. In Iowa, such services are paid for by an area education agency rather than by the school district, Tr. 284, which may explain why petitioner does not discuss them.

at 891 n.8; *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 665-666 (1985); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987). In any event, IDEA was enacted not only pursuant to Congress's authority under the Spending Clause, but also pursuant to Section 5 of the Fourteenth Amendment. See 20 U.S.C. 1400(b)(9) (Congress declaring intent in enacting EAHCA to "assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law"); *Smith* v. *Robinson*, 468 U.S. 992, 1013 (1984) (holding that IDEA precludes claim based on Equal Protection Clause because Congress intended IDEA to be the exclusive "vehicle for protecting the constitutional right of a handicapped child to a public education"); *Rowley*, 458 U.S. at 180 n.2., 192-200.

Moreover, two principles of statutory construction point in the opposite direction from petitioner's proposed approach: first, the canon that exceptions should be narrowly construed, see *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 731-732 (1995); *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993); and second, the principle that statutes, including those creating federal programs under the Spending Clause, are to be construed with deference to the regulations of the administering agency, see, *e.g.*, *Regions Hosp.* v. *Shalala*, 118 S. Ct. 909, 915 (1998); *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 414-420 (1993); *Rust* v. *Sullivan*, 500 U.S. 173, 184-190 (1991).

B. The Secretary Of Education's Interpretation Of The "Medical Services" Exclusion Is Reasonable, Longstanding, And Entitled To Deference

1. Congress delegated substantial authority to the Secretary under IDEA, including the power to review state plans, 20 U.S.C. 1413(c), to disburse federal funds, 20 U.S.C. 1420, and to withhold federal funds if there is a failure to comply with statutory requirements, 20 U.S.C. 1416(a). Congress

also entrusted the Secretary with the authority to issue "such rules and regulations as may be necessary," to carry out the requirements of IDEA. 20 U.S.C. 1417(b). The Secretary's regulations are "entitled to 'legislative effect,' and [are] controlling 'unless [they are] arbitrary, capricious, or manifestly contrary to the statute.'" *Atkins* v. *Rivera*, 477 U.S. 154, 162 (1986) (citations omitted); see *Tatro*, 468 U.S. at 891-892 (deferring to Secretary's IDEA regulations); *Honig* v. *Doe*, 484 U.S. 305, 325 n.8 (1988) (same); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Deference to the Secretary's interpretation of his own regulation is particularly appropriate here because of the longstanding nature of his interpretation. See *Zenith Radio Corp.* v. *United States*, 473 U.S. 433, 450 (1978); see also *Auer* v. *Robbins*, 117 S. Ct. 905, 911 (1997); *Honig*, 484 U.S. at 325 n.8 (deferring to Department of Education policy letter).

2. The "related services" regulation at issue here was initially promulgated in its current form in 1977, 42 Fed. Reg. 42,479 (1977) (codified at 45 C.F.R. 121a.13 (1978)), and is currently found at 34 C.F.R. 300.16. Throughout the intervening 20 years, the regulation has specified that "related services" include, *inter alia*, "school health services," which it defines as "services provided by a qualified school nurse or other qualified person." 34 C.F.R. 300.16(a) and (b)(11).[10] The regulation also has provided that "related services" include "medical services for diagnostic or evaluation purposes," and that "medical services," as used in the related services regulation, are those "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. 300.16(a) and (b)(4). Read together, those definitions establish that services provided by physicians, known as "medical services," are to be treated differently from all other health-related services that are necessary to assist a child with a disability to benefit from special education. Services provided by physicians are excluded unless they are diagnostic or evaluative, while services that can be provided by other qualified health personnel are "related services" so long as they are necessary to assist a child with a disability to benefit from special education.

In *Tatro*, this Court so construed the Secretary's regulation (then codified at 34 C.F.R. 300.13(b)(4)(1983)). The Court concluded that, because the regulation defines the "medical services" that are owed under IDEA as services provided by licensed physicians for purposes of diagnosis or evaluation, "[p]resumably this means that 'medical services' *not* owed under the statute are those 'services by a licensed physician' that serve other purposes." 468 U.S. at 892 n.10. That presumption derives from the common-sense principle that a single term—"medical services"—normally has a single meaning in determining both what is included and what is excluded under a single statutory provision.

3. The Secretary has consistently read his regulations in that manner. Following initial promulgation of the regulation (and before *Tatro*), the Secretary's representatives expressly repeated, in policy letters responding to inquiries about the provision of psychotherapy, the principle that coverage under the statute depends on whether a service is provided by a physician. The Secretary explained that "[i]f psychotherapy is interpreted in your State as a medical service (i.e. administered by a licensed physician), this service would not be required." Letter to Minsky, Educ. Handi-

[10] A "qualified" person is "a person [who] has met [state educational agency] approved or recognized certification, licensing, registration, or other comparable requirements that apply to the area in which he or she is providing special education or related services." 34 C.F.R. 300.15. The licensing requirements for performance of various tasks by non-physicians may vary from State to State but, as petitioner concedes (Pet. Br. 36), these requirements do not affect a student's entitlement to provision of related services under IDEA. See also Br. of Amici Curiae National Ass'n of Protection and Advocacy Systems et al. 23, n.14.

cap. L. Rep. 211:19, 20 (Apr. 7, 1978); accord Letter to Janda, Educ. Handicap. L. Rep. 211:205, 206 (Jan. 25, 1979). On the other hand, "in some States (and with certain professional disciplines) 'psychotherapy' might be provided by someone other than a psychiatrist (*e.g.*, a psychiatric social worker, etc.). In such cases, the provision of psychotherapy by someone other than a psychiatrist could be considered to be an appropriate related service under the regulations—if the service is needed to assist a handicapped child to benefit from special education." Letter to Millman, Educ. Handicap. L. Rep. 211:104, 105 (June 5, 1979).[11]

Petitioner errs in contending (Br. 25-27) that the above-cited letters and other policy letters by the Secretary's delegates do not apply a bright-line distinction between services provided by a physician and services provided by non-physicians. Petitioner (Br. 25-27) and its amicus (Br. of Amici Curiae National Ass'n of Protection and Advocacy Systems et al. 14 (NSBA Br.) specifically focus on a February 22, 1996, policy letter (Letter to Anderson, 24 Ind. Disab. Educ. L. Rep. 180, *reprinted at* Pet. App. 64a-67a), to contend that the Secretary "renounced" the bright-line test. See also *Morton Community Unit Sch. Dist. No. 709* v. *J.M.*, No. 97-3962, 1998 WL 420393 (7th Cir. July 27, 1998) (criticizing letter as evasive and noncommittal).

The February 22, 1996, letter was a response to a general inquiry whether the Secretary considers "one-to-one nursing services necessary for a student with disabilities to attend a public school setting" to be "a required related service or a medical service as determined by several recent court deci-

[11] See also Letter to Jacobs, Educ. Handicap. L. Rep. 211:54 (Aug. 14, 1978) (explaining that an optometrist, *i.e.*, a non-physician, may provide "diagnostic services" with IDEA funds, just as an audiologist may, but specifying that he is not qualified to provide "medical diagnostic services, because (among other things) they do not meet the definition of 'medical services' * * * (i.e. 'medical services' means services provided by a licensed physician").

sions?" 24 Ind. Disab. Educ. L. Rep. at 180. Because the question specifically referenced court decisions, the letter cited the various court decisions and acknowledged that courts have reached differing conclusions, and have based their analysis on various factors. *Ibid.* The letter clearly attributes that analysis to courts and does not, contrary to petitioner's claim (Br. 27), endorse it as the policy of the Department of Education. See also Letter to Anonymous, 25 Ind. Disab. Educ. L. Rep. 531, 532 (Nov. 13, 1996)(cited at Pet. Br. 27) (discussing distinction as one made by courts, not by the Department of Education).

The February 22, 1996, letter further notes that the question posed "could arise in a variety of factual contexts," and that the Secretary cannot "express a view as to whether or not 'one-to-one nursing' services are a required related service for an individual disabled student," because "the determination as to whether these services are required related services for an individual disabled student must be made on a case-by-case basis * * * by the participants on the student's IEP team." 24 Ind. Disab. Educ. L. Rep. at 180. The letter then unequivocally states that, "[i]f the student's IEP team determines that nursing services are a required related service for a particular student, those services must be provided at no cost to the parents." *Ibid.* Thus, that letter reaffirmed the Secretary's longstanding interpretation of IDEA that services provided by a nurse are not excluded medical services.

The case-by-case analysis required by the Secretary's policy letters is not, as petitioner contends (Br. 27), a rejection of the bright-line physician/non-physician rule. Rather, it is the three-prong test that the Secretary derived from

Tatro to be applied on a case-by-case basis to determine whether a health service must be provided:

> First, in order to be entitled to receive the service, the child must be handicapped * * * Second, the service must be necessary to aid a handicapped child to benefit from special education. If the treatment or medication could be given during non-school hours, then the school district is not required to provide the service, even if the burden would be minimal. Third, the service need only be provided if it can be provided by a nurse or other qualified person, not a physician.

Letter to Del Polito, Educ. Handicap. L. Rep. 211:392, 393 (June 24, 1986); Letter to Greer, 19 Ind. Disab. Educ. L. Rep. 348, 349 (July 14, 1992) (same); Letter to Johnson, 20 Ind. Disab. Educ. L. Rep. 174, 175 (Apr. 20, 1993) (same); 25 Ind. Disab. Educ. L. Rep. at 532 (same).

4. The courts that have adopted some type of balancing test based on the nature of the service and the economic burden it would place on a school district apparently view the Secretary's regulation to be an imperfect measure of the policies underlying the statutory "medical services" exclusion. See, *e.g.*, *Detsel* v. *Board of Educ. of Auburn*, 637 F. Supp. 1022 (N.D.N.Y. 1986), aff'd, 820 F.2d 587 (2d Cir.) (per curiam), cert. denied, 484 U.S. 981 (1987). Such an approach misconceives the proper relationship between the courts and the Secretary's delegated authority to issue regulations necessary to carry out the requirements of IDEA. 20 U.S.C. 1417(b). The Court explained in *Tatro* that the Secretary could have reasonably selected his definition of "medical services" in an attempt to spare school districts from unduly expensive services, reasoning that services provided by physicians were, on average, more expensive than other health services. See 468 U.S. at 892-893.

The Secretary's regulation reflects a reasonable determination that a bright-line rule regarding the meaning of

"medical services" will serve the policies of the statute better than a multi-factored test requiring individualized determinations in each case. See *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 600-601 (1981); *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 48-50 (1981); *Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356, 371-374 (1973). The regulation eliminates the costs and confusion that would result from a multi-factored test that would require adjudication of varied factual circumstances through the extensive appellate processes provided under the Act. See *Gray Panthers*, 453 U.S. at 48; *Weinberger* v. *Salfi*, 422 U.S. 749, 782-785 (1975); *American Hosp. Ass'n* v. *NLRB*, 899 F.2d 651, 659 (7th Cir. 1990) (Posner, J.) ("A rule makes one or a few of a mass of particulars legally decisive, ignoring the rest. The result is a gain in certainty, predictability, celerity, and economy, and a loss in individualized justice. Often the tradeoff is worthwhile; at least the prevalence of rules in our legal system so suggests."), aff'd, 499 U.S. 606 (1991).

C. Congress Has Ratified The Secretary's Interpretation Of "Related Services" And The "Medical Services" Exclusion In IDEA

After the statute had been interpreted to require States to provide school health services as "related services," and to exclude only physician-provided services as "medical services," Congress ratified that interpretation in the Education of the Handicapped Act Amendments of 1983, § 6, Pub. L. No. 98-199, 97 Stat. 1357, 1359.

On August 4, 1982, the then-Secretary of Education had issued proposed regulations that would have changed various regulations governing assistance to States for the education of handicapped children. 47 Fed. Reg. 33,836-33,860 (1982). One of his proposals was to narrow the "related services" regulation. The proposal was motivated by concerns about cost. The Secretary stated, in language similar to that of petitioner's amicus (NSBA Br. 24-28), that "[s]chools face

increasing costs in providing related services as health agencies and insurers which formerly paid them shift this responsibility * * * Many school officials have expressed their belief that some limitations must be placed on their responsibility for providing related services in light of their agencies' limited funds." 47 Fed. Reg. at 33,837-33,838.

The proposed regulations would have eliminated "school health services" from the definition of "related services"; they would have changed the meaning of excluded "medical services" from "services provided by a licensed physician" to "services relating to the practice of medicine"; and they would have allowed school districts to place "reasonable limitations" on provision of related services, based *inter alia* on the "level, frequency, location, and duration of the services" and the qualifications of the service providers. 47 Fed. Reg. at 33,838. Illustrations of services that were meant to be excluded by the changes included "[l]ife-sustaining procedures that * * * [m]ust be administered by specially trained, licensed health care professionals; or * * * [e]ntail a significant risk of illness or more than minimal injury to the child." *Id.* at 33,846.

In the course of explaining the proposed changes, the Secretary unequivocally confirmed the Department of Education's longstanding interpretation of the current statute and regulation to rest on a bright-line distinction between services provided by a physician and those provided by non-physicians: "[t]he statute defines related services to exclude medical services except where they are for diagnostic or evaluation purposes. The existing regulations define medical services as services provided by a licensed physician." 47 Fed. Reg. at 33,838.

Members of Congress criticized the proposed regulations, and specifically targeted a few of the proposed changes, including the amendment to the "related services" regulation. See 128 Cong. Rec. 20,620 (1982) (statement of Rep. Biaggi); *id.* at 21,793 (statement of Rep. Bonker); see also H.R. Rep.

No. 906, 97th Cong., 2d Sess. 4-5 (1982). On September 8, 1982, Congress enacted Section 305(b) of the Supplemental Appropriations Act, 1982, Pub. L. No. 97-257, 96 Stat. 818, 874, expressing the sense of Congress that the proposed regulations should not become effective and should not be transmitted to Congress while it was not in session.

On November 3, 1982, the Secretary withdrew six of the most controversial changes, including the proposal to narrow the "related services" regulation. See 47 Fed. Reg. 49,871-49,872 (1982); *Oversight Hearings on Proposed Changes in Regulations for the Education for All Handicapped Children Act: Before the Subcomm. on Select Educ. of the House Comm. on Educ. & Labor*, 97th Cong., 2d Sess. 122, 126-127, 175 (1982).

The following year, Congress added a new Section 608 to the Education of the Handicapped Act, which states that the Secretary

> may not implement * * * any regulation prescribed pursuant to this chapter which would procedurally or substantively lessen the protections provided to handicapped children under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to * * * related services * * *), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation.

Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, § 6, 97 Stat. 1357, 1359 (codified as amended, 20 U.S.C. 1407(b)). That provision was enacted in direct response to the proposed, then withdrawn, 1982 regulatory changes. See 129 Cong. Rec. 33,316 (1983) (statement of Rep. Biaggi) (explaining that provision was reaction to Secretary's 1982 proposals); see also H.R. Rep. No. 410, 98th Cong., 1st Sess. 21 (1983).

Thus, Section 608 constitutes a ratification of the Secretary's "related services" regulation, which includes school health services and excludes as medical services only services provided by a physician. It also reflects congressional disapproval of a multi-factor determination of "medical services" that would expand the exclusion to take into account the extent or nature of the services by excluding services provided by any "specially trained, licensed health care professionals" or services that involve "a significant risk of illness or more than minimal injury to the child." 47 Fed. Reg. at 33,846. "Where, as here, 'Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation,' we cannot but deem that construction virtually conclusive." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986). Hence, in asking this Court to construe the "medical services" exclusion to depend on factors such as cost, petitioner is, in essence, attempting to obtain through the courts what Congress rejected.

D. Petitioner's Cost-Based Arguments To Expand IDEA's "Medical Services" Exclusion Are Not Supported By The Statutory Structure And Are Inconsistent With The Intent Of Congress.

Petitioner and its amicus devote significant portions of their briefs to describing the fiscal burden they claim they would be required to shoulder should the court of appeals' judgment be affirmed. In doing so, they ignore steps Congress has taken to ensure that costs of "related services" for many disabled students are borne by other agencies.

Congress has provided States with tools to ensure that local educational districts are not unfairly burdened with health care costs. In 1975, when the predecessor to IDEA was enacted, the Senate Committee Report on EAHCA explained that, while Congress "has provided that the State education agency is to be the final responsible authority for

assuring that all handicapped children have available to them free appropriate public education, it does not intend that State and local educational agencies must be the sole providers of such services." S. Rep. No. 168, 94th Cong., 1st. Sess. 22 (1975).

In 1986, Congress took steps to facilitate the payment of expenses by sources other than educational agencies. Section 203 of the Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145, 1158-1159, entitled "Sharing of Costs of Free Appropriate Public Education," declared that, although the statute provides that state educational agencies bear the responsibility for ensuring that IDEA's requirements are carried out, that provision "shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State." §203, 100 Stat. 1159 (codified as amended, 20 U.S.C. 1412(6)). Section 203 also required that States

> set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to—(A) define the financial responsibility of each agency for providing handicapped children and youth with free appropriate public education, and (B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of the agreement.

§ 203, 100 Stat. 1159 (codified as amended, 20 U.S.C. 1413(a)(13)). In particular, Congress contemplated that child welfare funds and Medicaid would absorb part of the costs. Section 203 specified that the statute "shall not be construed to permit a State to reduce medical and other assistance

available or to alter eligibility under titles V [Maternal and Child Health Services Block Grant] and XIX [Medicaid] of the Social Security Act [42 U.S.C. 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education." § 203, 100 Stat. 1159 (codified at 20 U.S.C. 1413(e)).[12]

Section 203 was enacted in response to the General Accounting Office's (GAO) report in 1986 that some States had successfully established interagency agreements that recovered for school districts the costs of related services required by IDEA from Medicaid[13] and private insurers.[14] See H.R. Rep. No. 860, 99th Cong., 2d Sess. 21 (1986).

---

[12] Medicaid is a jointly funded federal-state program that provides health insurance to people, *inter alia*, who receive Aid to Families with Dependent Children or are disabled for purposes of the federal Supplemental Security Income program. See 42 U.S.C. 1396-1396v. Approximately 27% of all children with disabilities ages 1 to 17 receive Medicaid, and a significant additional number are eligible but unserved. See Nat'l Inst. on Disability and Rehabilitation Research, *Disability Statistics Reports: Medical Expenditures for People with Disabilities in the United States, 1987* 33, 34 (1996). Under Medicaid, each State is required to provide Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services for children under 21, which include any services covered by the federal Medicaid program, mandatory or optional, that are necessary to treat conditions identified through screening. Such services could include home health care, private duty nursing, or personal care services, see 42 U.S.C. 1396d(r) (incorporating services in 1396d(a)), all of which can include school health services. See *Skubel* v. *Fuoroli*, 113 F.3d 330 (2d Cir. 1997); *Detsel* v. *Sullivan*, 895 F.2d 58 (2d Cir. 1990). See generally Health Care Financing Admin., U.S. Dep't of Health & Human Servs., *Medicaid and School Health: A Technical Assistance Guide* (Aug. 1997).

Respondent apparently is not currently income-eligible for Medicaid because the monetary fund established as a settlement of liability for his injury has not yet been exhausted. Tr. 598.

[13] The GAO report noted that Connecticut had estimated that the State's school districts could recover approximately $5-6 million per year from Medicaid alone. U.S. Gen. Accounting Office, *Special Education: Financing Health and Educational Services for Handicapped Children* 12 (July 1986).

[14] While the scope of coverage varies considerably, many employers offer insurance plans that cover nursing and health aide services (although with co-payments and other limitations) for their employees' dependents. See 1 Task Force on Technology-Dependent Children, U.S. Dep't of Health & Human Servs., *Fostering Home and Community-Based Care for Technology-Dependent Children*, 136, 143-144 (Apr. 7, 1988). School districts may recover costs from the child's insurance, so long as there is no "financial loss" to the child or his family. See 45 Fed. Reg. 86,390 (1980); *Shook* v. *Gaston County Bd. of Educ.*, 882 F.2d 119 (4th Cir. 1989).

In 1988, Congress took further action to facilitate the use of Medicaid funds for payment of services included in a student's IEP under IDEA. Section 411(k)(13) of the Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 360, 102 Stat. 683, 798, specified that nothing in the Medicaid statute should "be construed as prohibiting or restricting," payments "for medical assistance for covered services furnished to a child with a disability because such services are included in the child's" IEP under IDEA. 102 Stat. 798 (codified at 42 U.S.C. 1396b(c)). Contrary to petitioner's contention (Pet. Br. 17), Congress did not thereby indicate that the medical assistance paid for by Medicaid would be for services not covered by IDEA. The assumption underlying that legislation was that some services qualify both as related services in IEPs and as services covered by Medicaid, and not that those categories are mutually exclusive as petitioner suggests. The legislative history explained:

> Federal Medicaid matching funds are available for the cost of health services, covered under a State's Medicaid plan, that are furnished to a handicapped child * * *, even though such services are included in the child's individualized education program * * * While the State education agencies are financially responsible for educational services, in the case of Medicaid-eligible handicapped child, State Medicaid agencies remain responsible for the 'related services' indentified [sic] in the child's IEP if they are covered under the State's Medicaid plan.

H.R. Rep. No. 661, 100th Cong., 2d Sess. 268-269 (1988).

Despite those legislative amendments, by 1990 over half the States were still not using interagency agreements. See A. Katsiyannis, *Provision of Related Services: State Practices and the Issue of Eligibility Criteria*, 24 J. Spec. Educ. 246, 249 (1990). A more recent report, based on results of a national survey of state special education finance systems, noted that, as of 1994-1995, "all but one of 42 reporting states used Medicaid as another source of special education revenue," and "[o]ver a quarter of the states reported that they used state mental health funds" or "private medical insurance" as sources of special education revenue. See T. B. Parrish et al., Center for Spec. Educ. Fin., *State Special Education Finance Systems, 1994-95*, at 29 (June 1997). Nonetheless, the report found that "[f]unding sources like Medicaid clearly have the potential to offset a greater share of special education costs," but are still being underutilized or underreported. *Id.* at 32.

In 1997, Congress strengthened the coordination provisions in IDEA to provide that the State "shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect" and that the agreements must be in writing. 1997 Amendments, § 612(a)(12)(A) and (C), 111 Stat. 64-65, 66. Such agreements must provide that the "financial responsibility of each public agency * * * , including the State Medicaid agency and other public insurers of children with disabilities, shall *precede* the financial responsibility of the local educational agency." *Id.* at § 612(a)(12)(A)(i) and (B)(ii), 111 Stat. 65, 66 (emphasis added). That subsection was "to reinforce two important principles: (1) that the State agency or [local educational agency] responsible for developing a child's IEP can look to non-educational agencies, such as Medicaid, to pay for or provide those services they (the non-educational agencies) are otherwise responsible for; and (2) that the State agency or [local educational agency] remains responsible for ensuring that children receive all the services described in

their IEPs in a timely fashion, regardless of whether another agency will ultimately pay for the services." H.R. Rep. No. 95, 105th Cong., 1st Sess. 92 (1997); S. Rep. No. 17, 105th Cong., 1st Sess. 12 (1997).[15]

In addition to Medicaid, other federal and state programs are also available to pay for related services required by children with disabilities to benefit from special education in the regular classroom. For example, the Maternal and Child Health Block Grant program, 42 U.S.C. 701 *et seq.*, provides States with funds to provide direct services to children with special heath care needs. See Office of Technology Assessment, U.S. Congress, *Technology-Dependent Children: Hospital v. Home Care: A Technical Memorandum* 70-71 (May 1987). The Balanced Budget Act of 1997 created the State Children's Health Insurance Program (CHIP), which will provide $48 billion over the next ten years for States to provide health services to low-income children who do not have health insurance and are not eligible for Medicaid. See Pub. L. No. 105-33, Tit. IV, 111 Stat. 251, 552 (to be codified at 42 U.S.C. 1397 *et seq.*); see also Nat'l Inst. on Disability and Rehabilitation Research, *Disability Statistics Reports: Medical Expenditures for People with Disabilities in the United States, 1987*, at 32, 34 (1996) (7% of children with disabilities had no insurance and were not covered by Medicaid or any other government program).

Moreover, the size of the financial burden that is placed on petitioner and other local school districts depends in large

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[15] See also 143 Cong. Rec. S4300 (daily ed. May 12, 1997) (statement of Sen. Harkin) ("[I]n States that have voluntarily provided interagency supports, cost savings to [local education agencies] have been significant. For instance, the Chicago public schools receive[] $40 million in support for medically related services for students with disabilities, which has enabled the district to contain costs for related services and increased the access of poor children with disabilities to comprehensive health care services."); *id.* at S4373 (daily ed. May 13, 1997) (statement of Sen. Murray); *id.* at S4407 (daily ed. May 14, 1997) (statement of Sen. Grassley).

part on their State's choice of a special education financing system. IDEA places the ultimate responsibility on state educational agencies to ensure that IDEA's requirements are carried out, and IDEA does not dictate how States structure their funding of special education and related services. Different States have adopted a variety of financing systems that spread the costs in different ways. See Parrish, *supra*. Of particular significance here, States are increasingly making special provisions for exceptionally high-cost students in their financing systems. *Id.* at 52. For example, under Vermont's special education funding program, if a local district spends in excess of three times the base amount per pupil on a single student with a disability, the State provides an "extraordinary services reimbursement" that reimburses the district for 90% of the excess expenditures. Vermont also provides "intensive services reimbursment," based on a district's ability to pay, for expenditures not covered by federal funds, the state and locally funded block grant, and the extraordinary cost allocation. *Id.* at 90; see also D. L. Montgomery, Am. Insts. for Research, *State Analysis Series, A Profile of Special Education Finance Reform in Vermont* (Mar. 1995). Thus, States have the flexibility to alter their financing systems to control the size of the financial burden placed on any particular local educational agency by the provision of related services.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1998

APPENDIX

1. The Individuals with Disabilities Education Act, as codified in 1994 at 20 U.S.C. 1400 *et seq.*, provided in relevant part:

§ 1400. Congressional statements and declarations

* * * * *

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

§ 1401. Definitions

(a) As used in this chapter—

* * * * *

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(18) The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

* * * * *

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include—

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency reponsibilities [sic] or linkages (or both) before the student leaves the school setting,

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

* * * * *

§ 1407. Regulation requirements

* * * * *

(b) Lessening of procedural or substantive protections as in effect on July 20, 1983, prohibited

The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this chapter which would procedurally or substantively lessen the protections provided to children with disabilities under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines [sic], attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation.

* * * * *

§ 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

* * * * *

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, * * *.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency and shall meet

education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided children with disabilities in the State.

* * * * *

§ 1413. State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall—

* * * * *

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to—

(A) define the financial responsibility of each agency for providing children and youth with disabilities with free appropriate public education, and

(B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to

secure reimbursement from other agencies or otherwise implement the provisions of the agreement;

* * * * *

(e) Prohibition on reduction of assistance

This chapter shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act [42 U.S.C. 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education for children with disabilities within the State

* * * * *

§ 1417. Administration

* * * * *

(b) Rules and regulations

In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

2. 34 C.F.R. 300.16 provides in relevant part:

§ 300.16 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

* * * * *

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

* * * * *

(11) "School health services" means services provided by a qualified school nurse or other qualified person.

* * * * *

Supreme Court, U.S.
FILED
JUL 2 1998
OFFICE OF THE CLERK

No. 96-1793

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,
Petitioner,

v.

GARRET F.,
A Minor by His Mother and next friend,
CHARLENE F.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 8, 1997
CERTIORARI GRANTED MAY 18, 1998

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
January 6, 1995	Complaint (w/notice, consents, LR16 and reports to atty for svc)
May 15, 1995	Answer by defendant
October 30, 1995	Motion by Plaintiff for Summary Judgment and oral argument requested, assigned to Senior Judge Edward J. McManus
October 30, 1995	Statement of Undisputed Material Facts by Plaintiff
December 8, 1995	Cross-Motion for Summary Judgment by Defendants assigned to Senior Judge Edward J. McManus
December 8, 1995	Defendants' Statement of Undisputed Material Facts
March 22, 1996	Order by Senior Judge Edward J. McManus Granting Defendant's Motion for Summary Judgment, Denying Plaintiff's Motion for Summary Judgment
March 22, 1996	Judgment: terminating case; Plaintiff take nothing and that this action be dismissed
April 11, 1996	Notice of Appeal by Plaintiff from District Court decision, (cc: all counsel w/dkt sheet and Notice of Appeal) 8th CCA w/dkt sheets, Notice of Appeal, Order and Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
December 12, 1996	Argued and Submitted in St. Paul to Judges Pasco M. Bowman, Circuit Judgment, Gerald W. Heany, Senior Judge, Lyle E. Strom, Visiting Judge (U.S. District Court, District of Nebraska, Omaha, Nebraska). Sue Luettjohann Seitz for Appellant Cedar Rapids. Douglas Robert Oelschlaeger for Appellee Garret F. Rebuttal by: Ms. Seitz.
February 7, 1997	The Court: Pasco M. Bowman, Gerald W. Heaney, Lyle E. Strom. Opinion filed by Lyle E. Strom
February 7, 1997	Judgment: Pasco M. Bowman, Gerald W. Heaney, Lyle E. Strom: The judgment of the lower court is Affirmed in accordance with the opinion
May 23, 1997	U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 5/8/97. Supreme Court Case No. 96-1793

[Testimony from Administrative Hearing Dated October 31, 1994]

* * * *

[DIRECT EXAMINATION—CHARLENE FREY]

[BY MR. OELSCHLAEGER:]

[32] Q. Now, is the suctioning something that Garret's friends can also perform?

A. Yes; they do it at home all the time.

* * * *

[33] Q. Do his friends on occasion do the ambu-bag procedure as well?

A. They do it both; they ambu-bag him and suction him.

* * * *

[34] Q. Do his friends assist with feeding and drinking?

A. They have in the past; I mean, they do at home all the time.

* * * *

[36] Q. If the ventilator for some reason stopped working and Garret is at school, is there some way that he can breathe?

A. He could be manually bagged for a long period of time. We bagged him going to Denver the whole trip.

He could also have a backup ventilator there that could be—I mean, if it was going to be a period of time, instead of delaying him from getting back to class or something, he could have a backup ventilator there.

Q. But the ambu-bag procedure would be sufficient to sustain him and sustain his ventilation needs for a period of hours.

A. Yes.

* * * *

[37] Q. Do Garret's friends ever get involved in things such as shutting off alarms on the ventilator?

A. Yes; they're familiar with the same alarm codes or whatever that I would be or anybody that is familiar with Garret.

* * * *

[DIRECT EXAMINATION—DR. REINERTSON]

[BY MR. OELSCHLAEGER:]

[42] Q. The educational process that Garret has been involved in in the years that you have treated him involves an attendant, which takes care of some of his needs, such as suctioning, positioning, needs that he has during the school day. And what I'd like to ask you, Dr. Reinertson, is: Have you come up with—and feel free to look at your file—have you come up with a list of the competencies for that attendant?

A. There have been a couple of occasions; I think, if I'm not mistaken, the first was in '88. That was the first time we had talked with the school about this, and I had written a letter to Mrs. Koehn—

MR. MUELLER: Koehn.

A. Koehn, regarding Garret's experience at school. At that time I wrote a letter detailing the minimal responsibilities in proficiency areas I thought were necessary.

* * * *

[43] A. An annual pediatric CPR certification or recertification of CPR, cardiopulmonary resuscitation.

Q. And you don't have to be a L.P.N. or an R.N. to get that certification, do you?

A. Correct.

MS. SEITZ: Excuse me, Doug. I do not have a list of competencies.

MR. OELSCHLAEGER: I think it's Attachment C to Exhibit 20. I don't know if I misnumbered my exhibits.

MS. SEITZ: I think it's 26; 20 was the draft of the agreement, and 26 is where he can finds it.

* * * *

Q. (By Mr. Oelschlaeger) What was the next competency that you believed was required at that time, Dr. Reinertson?

A. Ability to assess breath sounds by [44] auscultation.

Q. And would you describe for the record what auscultation is.

A. Auscultation is listening with a stethoscope to the lungs.

Q. And what level of nursing expertise or qualification would that require?

A. That certainly can be acquired by a health aide.

* * * *

Q. Then what was the next competency that you believed to exist in July of '88?

A. Ability to recognize the signs and [45] symptoms of respiratory distress and/or hypoxia.

* * * *

Q. And what level of nursing ability or nursing certification would that require?

A. Again, I think a nurse's aide can be trained to recognize these symptoms.

Q. What was the next competency that you believed to exist, Doctor?

A. The ability to care for a tracheostomy, including suctioning and changing of the trach tube.

Q. And Charlene has described for us on the record what that involves. What level of nursing expertise or care does that require?

[46] A. Especially changing the trach tube is a mechanical type of procedure, and this can certainly be taught, I think, again to a nurse's aide.

The suctioning can also be performed by that level of service, and when I mention nurse's aide, obviously anybody above nurse's aide would be able to do this as well.

Q. What was the next compentency that you believed to exist?

A. Ability to bag safely by way of the trach.

Q. And what was the level of nursing competency that that required?

A. Again, the bagging itself can be taught to a nurse's aide.

Q. What was the next competency, Doctor?

A. Working knowledge of any emergency protocols and procedures regarding Garret's case.

Q. What level of care was required there?

A. Again, I believe that that can be performed by a nurse's aide.

Q. And the next competency?

A. Working knowledge of monitors and equipment, such as placement of oxygen delivery [47] devices required. That would be, for example, a mask in case his ventilator was not working, properly checking and calibrating the ventilator setting, troubleshooting of ventilator malfunction, humidity system, to check water level fillant and ability to drain water from tubing; check compressor operation and assessment of suction machine pressure and function.

Q. What level of care is required for that?

A. Again, I think a nurse's aide can do these things.

Q. And then was there some requirements as to documentation?

A. Documenting the observations during school time.

Q. And what level of care was required for that?

A. Any level of care; a nurse's aide would be certainly able to document it.

Q. Now, of the eight competencies reflected on your July 11, 1988 letter, Exhibit 26, are any of those services or competencies required to be performed by a physician?

A. No.

Q. Do you need to be a physician to perform [48] any of those?

A. No.

Q. Dr. Reinertson, I think your next written document on this nursing issue was a health status addendum

in, I believe, July of '93. Do you have that there in front of you?

* * * *

[49] MR. OELSCHLAEGER: That is Exhibit 78, part of Exhibit 78.

Q. (By Mr. Oelschlaeger) Doctor, how did it come that you filled that particular form?

A. Well, to the best of my recollection, I was asked to do this for the school system.

Q. Were you still his treating physician at this time?

A. Yes.

* * * *

[50] Let's refer to the form. First of all, there's a reference there to bladder catheterization once during school hours?

A. Yes.

Q. And what would be the level of nursing competency required for that?

A. A nurse's aide could learn to do that.

Q. Is a physician required to do that?

A. No.

Q. And then we had suctioning of his tracheostomy on an as needed basis; we've already discussed that in connection with the July 1988 report. And then we have, "Food and drink on a regular schedule and as needed." What level of expertise would be required there?

A. Any health aide or below could actually help with that.

Q. A physician is not required for that?

A. Correct.

Q. You discussed bagging again, and that was discussed, I believe, in your July of '88 letter. What level of care is needed for bagging?

A. Health aide may learn to do that.

Q. You don't need a physician for that?

[51] A. Correct.

Q. Then a specific question apparently the district asked there on 7 was: What was your recommendation of

the preparation and qualification of the individuals performing health care procedures in school; and your response says, "A minimum degree of L.P.N. or a skilled care provider who has demonstrated the competencies as described in the '88 letter."

And when you use words, "skilled care provider," is that again reflecting them to a trained nurse's aide of some sort?

A. Correct.

Q. So as of July of '93, it was still your opinion that a physician was not required to do these services?

A. Yes.

* * * *

[53] Q. So in your opinion, the items of care that need to be done for Garret at school are items of care that can be performed by a provider, such as a nurse's aide with appropriate training or an L.P.N., either level of expertise?

A. An L.P.N. with the appropriate training, correct.

Q. And none of those are things that are required to be done by a licensed physician such as yourself?

A. Correct.

* * * *

[CROSS EXAMINATION—DR. REINERTSON]

[BY MS. SEITZ:]

[57] Q. Have you trained Mrs. Frey to provide the care that Garret requires?

A. I have not trained her personally.

Q. But in your judgment, she's needed additional assistance than what she can do?

A. She may need assistance in caring for Garret.

Q. You wouldn't see Garret's friends being able to provide all of the care that he needs?

A. I would think not.

* * * *

[68] REDIRECT EXAMINATION

BY MR. OELSCHLAEGER:

Q. First of all, let me address the issue of the nursing care that the Frey family receives at their home here in Cedar Rapids. You're aware, are you not, that the Freys on weekends have no nursing assistance?

A. Yes.

Q. Does that cause you any great concern as a physician that they perform these various tasks that we've described by themselves?

A. No.

Q. And in fact, if an L.P.N. were to provide these services, the L.P.N. would also need some additional training just beyond the basic L.P.N. degree to perform these services; isn't that true?

A. Correct.

Q. And they would receive basically the same training a nurse's aide would receive to do these services?

[69] A. Correct.

* * * *

[72] [Administrative Law Judge] Is it your testimony that the care given to Garret at school would not require the specialized training of a registered nurse but would instead be someone else who is specially trained; perhaps a licensed practical nurse, perhaps someone just familiar with medical technology and medical procedures but not having specialized training as a nurse? Is that your testimony?

THE WITNESS: That would be accurate, as long as I may add that they are supervised.

ADMINISTRATIVE LAW JUDGE BARTLETT: And what kind of supervision are you talking about?

THE WITNESS: Supervision of—whether it be an R.N. or a physician, someone who they have the ability to contact with questions, should they arise.

ADMINISTRATIVE LAW JUDGE BARTLETT: Would that have to be supervision on site?

THE WITNESS: No.

* * * *

[REDIRECT EXAMINATION] [MRS. FREY]

[BY MR. OELSCHLAEGER:]

[79] Q. Does Garret know when the ventilator setting is off?

A. Yes.

Q. So he can direct his care provider to do [80] something at that point, if that occurs?

A. Yes.

Q. Have adjustments been made to the ventilator at any time in school, to your knowledge?

A. Not to my knowledge, no.

* * * *

[82] Q. I wanted to ask you about your sister; there was some testimony concerning this from Dr. Reinertson. First of all, what's her name?

A. Stephanie Madison.

Q. And how old was Stephanie when she went to Taylor School to do these care things for Garret?

A. I believe when she started she was 18, and into the next part of the year, she was 19.

Q. She wasn't an R.N. or L.P.N. or anything like that at the time?

* * * *

[83] A. No.

Q. Had she had any prior experience nursing?

A. No.

* * * *

Q. We'd also talked before Dr. Reinertson testified about some things Garret's friends can do for him; I

think we discussed suctioning and bagging and the basics of ventilator observation or care.

Do his friends shut off the alarms on the ventillator?

[84] A. Yes.

Q. Do his friends help him use his wheelchair?

A. Yes.

Q. Can they help do other things with the ventilator, such as plug it in or anything like that?

A. Yes; they know when the low power alarms or power switch-over alarms go off, they do know the chair needs to be plugged in. They'll plug it in.

* * * *

[85] Q. Do they recline him in his chair?

A. Uh-huh.

Q. Try to answer yes or no for the court reporter; I know that's difficult sometimes.

A. Yes.

Q. Do they assist in his feeding?

A. Yes.

Q. And his drinking?

A. Yes.

Q. And I assume that Garret can communicate his needs to his friends?

A. Yes, he communicates.

Q. And maybe this isn't clear on the record, but Garret can talk?

A. Yes.

* * * *

[89] Q. And does that nurse, the L.P.N., have any sort of regular supervision by an R.N., to your knowledge?

A. She has somebody supervising her, but not—she comes out, and she may visit twice during the school year.

Q. So in terms of on-site visits by an R.N., it would be twice a year at the school?

A. Yes.

Q. Let's talk about the cost of the nursing care that Garret is getting. First of all, for this school year, the '94-95 school year, what is the cost of the nurse?

A. $22 per hour.

Q. And how many hours per day does the nurse attend to Garret for the school day?

A. Seven hours.

Q. And how many days a year is that?

A. I don't know how many days are in a school year; 180.

* * * *

[CROSS EXAMINATION—MRS. FREY]

[BY MS. SEITZ:]

[131] Q. But there's been a certification by Dr. Reinertson that you need nursing services at home; isn't that correct?

A. From what I heard him say, yes, but there is a reason for it.

Q. Are you receiving a licensed nurse at home?

A. Yes.

Q. And is that an L.P.N.?

A. Yes.

Q. It's not a nurse's aide?

A. No.

* * * *

[REDIRECT EXAMINATION—MRS. FREY]

[BY MR. OELSCHLAEGER:]

[168] Q. Now, you use currently an L.P.N. at home. Would you tell Judge Bartlett why you do that.

A. With the insurance we have right now, their policy, in order to reimburse it, has to be through a licensed agency.

Q. And was the policy you had previously, the Blue Cross/Blue Shield policy, did that pay for services given

by Stephanie Madison, even though she was not a licensed provider?

A. Yes.

* * * *

[175] ADMINISTRATIVE LAW JUDGE BARTLETT: Okay. You indicated that for the first school year your sister assisted Garret at school. What kind of specialized training, if any, did she have to do that?

THE WITNESS: When Garret was in rehabilitation in Denver, Colorado, at the Children's Hospital, she spent some time with us there. And basically, she participated in his care there; she participated in his care initially at the University Hospitals when they let family members get involved with his care, that sort of—I mean, nothing formally.

ADMINISTRATIVE LAW JUDGE BARTLETT: Just [176] things she picked up being with the family in those settings?

THE WITNESS: Uh-huh.

ADMINISTRATIVE LAW JUDGE BARTLETT: So she didn't go to any particular training organization or hospital for that particular training?

THE WITNESS: No.

ADMINISTRATIVE LAW JUDGE BARTLETT: You indicated that Garret sometimes has friends visit him in the home?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE BARTLETT: How frequently is that?

THE WITNESS: Maybe once or twice after school during the week, and usually every weekend.

ADMINISTRATIVE LAW JUDGE BARTLETT: How have they picked up what the different electronic signals are from the equipment?

THE WITNESS: Basically just being around him, becoming familiar with watching us do it, asking Garret, Garret telling them. We have—if they have indicated by

verbally saying, "I think I could do that," or Garret would say, "Would you [177] like to learn how to do that?" as far as the suctioning, we would explain the procedure and show them how to do it, which they'd seen already, but let them participate in doing it.

* * * *

[DIRECT EXAMINATION—NANCY RAW]

[BY MS. SEITZ:]

[252] Q. Which persons present were medical personnel?

A. A Margie Pence from Mercy Home Health Care; Rhoda Shepherd, the district manager of health services; Candy Krall, who was the school nurse; Mary Simmons, who was also a school nurse but also our special education nurse.

Q. And was Mrs. Frey also present?

A. Yes, she was.

Q. Who participated in the discussion of the actual medical needs and procedures? Did you?

A. No.

Q. Who did?

A. That would have been our nursing staff, Mrs. Frey. It was open for anyone to offer input; those were probably the people that had the most [253] to offer.

I can't remember for sure if comments were made by other members, but they would have been—nursing and Mrs. Frey, in my recollection, were the ones that did.

Q. And did you consider the physician clarifying questions and answers?

A. Oh, yes.

Q. When did you obtain that document?

A. The final list of the questions, Dr. Mueller and I on the way to the meeting at Coolidge drove over to the Frey home and picked up the responses to those questions.

Q. So you only were able to receive them immediately prior to the meeting?

A. Yes.

Q. But they were considered at the meeting?

A. Yes.

Q. This is the IHP that became the subject of this appeal; is that correct?

A. That's correct.

Q. Document 91; is that correct?

A. Yes.

Q. What was the conclusion of the IHP team as to the care that Garret required?

[254] A. That he require continuous care by an appropriate licensed practitioner.

Q. And is that stated on this form?

A. Yes, it is.

Q. And was a rationale given for that conclusion?

A. Yes.

Q. What was that rationale?

A. That Garret requires continued monitoring and assessment, highly technical and extensive nature of care, life-threatening prospect of inadequate care, mastering of numerous competencies.

* * * *

[298] MS. SEITZ: Then we don't need that. We have a stipulation to Exhibit 137, which is comprised of four pages.

The first page shows the cost of hiring a nurse in the Cedar Rapids Community School District for 1993-94. Without Phase II funds, the salary is 26,557; total package, 36,228. The second page is also the cost of hiring a new nurse, no experience, B.A. lane, and the district salary without Phase II is 27,470; total package, 37,270. I'm sorry. I just messed those up those two numbers are nurses at Step 10 on the B.A. lane.

And then we have the same thing with a new nurse. With Phase II it's 19,550 salary; total package, 28,231.

Without Phase II salary is [299] 18,902; total package, $27,492.

* * * *

[Dated November 1, 1994]

[DIRECT EXAMINATION—RHODA SHEPHERD]

[BY MS. SEITZ:]

[331] Q. The conclusion of this IHP indicates that these functions needed to be performed for continuous care by an appropriate licensed—it says practioner, but I think it means practitioner?

A. Right.

Q. Who made that decision that that would be the conclusion of the IHP.

A. I would say that that is a decision of a nurse. You know, I really made that decision based on what I learned from what his needs were.

Q. So you were instrumental in making that determination?

A. Yes.

Q. Why did you determine that Garret needed continuous care and that it needed to be by an appropriate licensed practitioner; what criteria did you use in making that decision?

A. Well, I used my own judgment in terms of what I knew would be required in terms of continuous monitoring and observation of Garret because of his needs.

Q. Was it the observation and monitoring [332] that led you to that conclusion, or was it one of the other functions; that he needed to be fed or needed to have fluids?

A. It was continuous monitoring and evaluation as well as the complexity of his needs.

* * * *

CROSS-EXAMINATION—RHODA SHEPHERD

BY MR. OELSCHLAEGER:

[353] Q. Are the B.S.N.s employed by the district licensed in some way by the State of Iowa?

A. Certainly.

[354] Q. Are they licensed as B.S.N.s or licensed as registered nurses?

A. They're licensed as registered nurses by the Board of Nursing.

Q. So whether someone has a B.S.N. degree or an R.N. degree, it really doesn't matter?

A. It does matter in our district. We hire people who have bachelor of science degrees.

Q. But somebody could be a licensed R.N. and not have that degree?

A. There are licensed R.N.'s who do not have a four-year degree, that's true.

Q. And that progrem, I think, used to be a three-year program?

A. There are two- and three-year programs for registered nurses.

Q. So as far as the State Nursing Board is concerned, somebody with a two-year R.N. degree and a license in the state of Iowa, according to your opinion, could provide these services, even though the district doesn't hire them?

A. In our district we employ people that have bachelors of science degree.

Q. I understand that. My question was this, though: A licensed registered nurse with two [355] years of education could perform these services, in your opinion, in the event that for some reason a B.S.N. couldn't be hired by the district, or is that just something that this district wouldn't allow?

A. I don't believe we'd hire someone that wasn't baccalaureate prepared, because we'd need to be able to use that nurse in other situations once we've hired her.

If Garret no longer requires the care for some reason, she'd still be an employee of the district.

* * * *

[Dated November 14, 1994]

DIRECT EXAMINATION—DR. REINERTSON

BY MR. OELSCHLAEGER:

[627] Q. Dr. Reinertson, after you testified, the district had two nurses testify in their behalf, and I wanted to ask you a couple of questions about a topic that didn't specifically come up during your examination.

First of all, referring to Exhibit 91, the nurse or nurse team made the conclusion on the "Rationale for Decision" section that Garret required continuous monitoring and assessment.

Do you see that on Exhibit 91?

[628] A. This is Exhibit 91?

Q. Yes.

A. Yes, I do.

Q. Based upon your training and education, Dr. Reinertson, and your care of Garrett Frey for the last several years, do you agree or disagree with that statement?

A. I would disagree.

Q. And another statement that was made in your absence by the nurse was that her conclusion, which we just discussed, was based on Physician Clarifying Statements 13 and 14 which appear also as part of Exhibit 91, and I have now directed your attention to those two paragraphs.

Dr. Reinertson, when you made those statements, did you intend to infer that Garret needed continuous monitoring and assessment?

A. No. The only monitoring that I inferred at the time that I wrote these would be that he would require someone within earshot to respond to his needs, not necessarily continuously monitoring.

* * * *

[DIRECT EXAMINATION—GERALD FREY]

[BY MR. OELSCHLAEGER:]

[640] Q. All right. Just describe generally for the judge what a weekend is like with Garret.

A. Well, usually I'll pick him up on Friday night, and he usually takes a friend along, and they spend the weekend.

And depends on what plans we have. If it's raining, we don't do anything. If's its [641] nice out, we try to do something.

Q. Okay. Now, is there a full-time nurse that attends to Garret during the weekends that you have him?

A. No.

Q. You take care of whatever health needs he has?

A. Yeah.

Q. Has that proven to be a satisfactory arrangement?

A. Yes.

* * * *

[DIRECT EXAMINATION—CHARLENE FREY]

[BY MR. OELSCHLAEGER:]

[654] Q. Now, I also wanted to talk a little bit about Garret's time at home. When you're at home with him and there's not a nurse at home, just tell us what it's like.

A. Well, he gets home from school about a quarter till 3. The nurse, depending on what day it is, usually leaves immediately or at quarter after 3.

So from the time quarter after 3 until 11, 11:30 at night, we are alone. We have dinner together. We may go to the grocery store.

Garret has a couple favorite TV programs that he watches. He's a sports nut, so he watches a lot of sports. He plays on the computer. He does his homework. He may have a friend over.

Depending on the weather, he may be outside. We may go outside. And seems like all I've done is rake, but we'll go out there and—and do various things outside.

We may take a walk. He may take a nap; I may take a nap. Just normal—normal stuff.

[655] Q. So there's, I assume, a fair amount of time where you're not just immediately in his proximity?

A. Oh, all the time. He goes outside by himself. He'll go across to the neighbor's across the street by himself. He's taken a walk around the block by himself.

He spends a lot of time by himself, outside, inside. I don't leave him home alone, but I mean there's always —I mean if he goes across to the neighbor's—and in fact, this summer his alarm went off when he was across the street and in their backyard, and I, you know, had the door open. I could hear the alarm.

Q. Okay. And you went over and checked up on it?

A. Yes.

* * * *

(5)

Supreme Court, U.S.
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OCTOBER TERM, 1997

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,
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GARRET F., A MINOR BY HIS MOTHER AND NEXT FRIEND, CHARLENE F.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether a school district is required to pay for continuous one-on-one nursing services for a disabled student, when the Individuals With Disabilities Education Act expressly excludes "medical services" from its mandate.

2. Whether there should be a bright-line rule that the Act's exclusion of "medical services" means only those services provided by a physician, or whether other medical services are excluded from the Act.

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IN THE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 106 F.3d 822 and is reproduced at Pet. App. 1a-7a. The opinion of the District Court for the Northern District of Iowa is unpublished, but appears at 24 Individ. Disab. Educ. L. Rep. 648 and is reproduced at Pet. App. 8a-16a. The unpublished decision of the Administrative Law Judge on behalf of the Iowa Department of Education appears at 22 Individ. Disab. Educ. L. Rep. 278 and is reproduced at Pet. App. 17a-63a.

JURISDICTION

The Court of Appeals for the Eighth Circuit entered its judgment on February 7, 1997. The Cedar Rapids Com-

munity School District filed a petition for writ of certiorari on May 8, 1997, which this Court granted on May 18, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves consideration of the Individuals With Disabilities Education Act (the "IDEA" or "Act"), 20 U.S.C. § 1400 *et seq.* The IDEA was amended in 1997 (1997 Amendments), Pub. L. No. 150-17. Unless otherwise noted, citations are to the 1994 codified version of IDEA in effect immediately prior to the 1997 Amendments, the statute in effect at the time Respondent sought funding for services.

20 U.S.C. § 1412 provides in pertinent part:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:
>
> (1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

20 U.S.C. § 1401 provides in pertinent part:

> (a) As used in this chapter—
>
> * * * *
>
> (16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including—
>
> (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
>
> (B) instruction in physical education.
>
> (17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation,

> including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.
>
> (18) The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
>
> (D) are provided in conformity with the individualized education program required under Sec. 1414(a)(5) of this title.

STATEMENT OF THE CASE

A. Garret F.'s Condition and Needs.

Respondent Garret F. is a ventilator-dependent child enrolled in the Cedar Rapids Community School District. In 1987, when Garret was four years old, he was seriously injured when his blanket caught in the drive mechanism of the motorcycle on which he was riding, jerking his head. Garret suffered a complete transection of the spine and, as a result, is quadriplegic and completely paralyzed below his neck. Garret depends on a ventilator for breathing. He has normal mental capacity, is able to speak, and uses a puff and sip straw to control a wheelchair. Pet. App. 19a-20a.

It is undisputed that Garret requires the following health services while at school:

- urinary bladder catheterization (usually once a day);
- suctioning of his tracheostomy as needed;
- change of positioning;
- ambu bag administration in cases of ventilator malfunctioning (this consists of manual pumping of an air bag attached to his tracheostomy tube);
- ventilator setting checks, observations and assessments to determine if Garret is in respiratory distress;
- assessment to determine if Garret is experiencing autonomic hyperreflexia; and
- blood pressure monitoring, urinary catheterization and bowel disimpaction in the event of an episode of autonomic hyperreflexia.[1]

Pet. App. 20a. These observation and monitoring services must be provided continuously by trained personnel because Garret could die if his breathing were interrupted for just a few minutes. Unlike every other student in the District who receives free health-related services from the District during the day, Garret F. requires "constant assessment and monitoring." TR at 338; EX 94 at 364-378.

B. Services Provided by the District.

For every year since Garret enrolled in the District in 1988, the District has provided him with an individualized educational plan ("IEP") written by a multi-disciplinary

[1] "Autonomic hyperreflexia" is a life-threatening abnormal response of the autonomic nervous system that can occur in a ventilator-dependent individual such as Garret. Among other things, it results in elevated blood pressure and must be treated immediately. Garret has experienced several episodes of autonomic hyperreflexia. TR at 76-77, 81-82.

educational team. Garret has always received instructional services in regular education classrooms.

The District has also hired an *educational* associate to assist Garret in moving about the building and in manipulating his District-provided computer and other instructional materials. The associate, who is compensated at the rate of approximately $9,500 a year, does not attend to Garret F.'s health-related needs. EX 128 at 463.[2]

Additionally, the District has provided Garret with special transportation; for the past several years, this has consisted of a special lift bus. Finally, Garret has been provided with specialized equipment paid for by the District, including a computer with a mouth stick and special software. TR at 217.

C. The Parties' Dispute Over the Obligation to Provide Continuous One-on-One Nursing Services for Garret F.

During the first several years of Garret's enrollment in the District, the District and Garret's parents entered into an agreement that the family would provide a full-time attendant for Garret while he was at school. EX 20 at 84-89; EX 26 at 96-115. The family's health insurance and a trust fund established after a settlement of legal claims arising out of the motorcycle accident covered the costs of this attendant. Since 1989, this attendant has been an L.P.N. who attends exclusively and continuously for Garret while he is at school. J.A. at 11.[3]

In 1993, when Garret entered fifth grade, Garret's mother, Charlene F., requested that the District bear the

[2] Although the District's educational associate in 1994 happened to be a licensed practical nurse ("L.P.N."), she was not called upon to provide nor compensated for providing any health-related services. The current educational associate is not an L.P.N.

[3] In addition, this L.P.N. and another L.P.N. provide services for Garret in his home. Garret receives one-on-one nursing services for 16 hours per weekday. J.A. at 12; TR at 129.

costs of the full-time attendant required by Garret. The District declined Charlene F.'s request that it pay for Garret's continuous nursing services, taking the position that the services in question were medical services which the District was not obligated to provide. EX 93 at 390. The District has been willing to contribute the full amount of the teaching associate's salary (approximately $9,500) toward the nurse's salary, with the understanding that the nurse would then fulfill the educational associate's duties as well.

The District—one of the largest in Iowa—operates approximately 33 schools for approximately 17,500 students. In 1994, approximately 2,200 of its students received special education services. The District has the equivalent of six full-time registered nurses to serve its 17,500 students and 33 schools. No building has a registered nurse continuously on site, and the District does not provide one-on-one continuous care for any other student. Extensive testimony appears in the record regarding duties of school nurses in Cedar Rapids. TR at 441-442, 477-80.[4] None of those duties includes continuous monitoring or treatment. The parties stipulated that, as of 1994, the District paid its least senior nurse approximately $37,000 including benefits, and that it would cost at least $27,000 to hire a special nurse for Garret. J.A. at 15-16.

The parties also stipulated that if the District employed the nurse, the costs of the teaching associate currently hired by the School District could be saved, as the District could assign the duties of the teacher associate to the nurse (helping Garret physically move about the building,

[4] These duties include planning health services for children; attending child study team meetings when children have health concerns; supervising and inservicing secretaries and staff who administer medications, give emergency first aid, and provide other intermittent care such as gastric feedings and CIC; providing health education in the classroom; insuring facility safety; checking student immunization records; and other record-keeping.

turn pages, manipulate materials). TR at 465. The additional costs to the District, as later calculated by the administrative law judge, were thus between $20,000 and $30,000. Pet. App. 53a.

Following the District's denial of continuous nursing services, Garret F.'s mother requested an administrative hearing pursuant to the Individuals With Disabilities Education Act (the "IDEA"). EX 96 at 401. The hearing was continued while the District sought additional information from the Iowa Board of Nursing. The Board of Nursing provided a declaratory ruling that the care required by Garret could not be delegated at school to a nonlicensed practitioner. EX 125 at 447-461. The Nursing Board rules also provide that care may not be delegated from a registered nurse (R.N.) to a licensed practical nurse (L.P.N.) unless an R.N. is in the same building at all times. EX 94 at 392-394.

Because the Iowa Board of Nursing had specifically ruled that the District could not delegate Garret's required care to anyone who was not a nurse, it was not possible to entrust the continuous monitoring of Garret to nonlicensed personnel, as Garret's physician Dr. Reinertson suggested. Also, the District nurse testified that even if the Board of Nursing had ruled that she could legally delegate the nursing services to a nonlicensed person, she would not have felt comfortable doing so. TR at 453-454.

D. The Administrative Hearing.

A state administrative hearing was held, and on December 16, 1994, an Iowa administrative law judge ruled that the District was required to provide for all of Garret's health needs at school including the continuous intensive nursing services he requires. Pet. App. 17a-63a. The ALJ read this Court's decision in *Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984), as requiring the District to provide, under the IDEA, *any* health care

service that is not administered by a physician.[5] The ALJ stated, "As much as this ALJ may disagree with the public policy of spending education funds on health services, he does not feel he has the authority to change the law." Pet. App. 51a.

In dicta, the ALJ noted that even if the IDEA did not define "medical services" so narrowly as to include only services directly administered by a physician, and instead imposed a balancing test as several lower courts had found, the District still had to provide the requested one-on-one continuous services for Garret. Although the ALJ's opinion on this point is somewhat unclear, he appeared to suggest either that the District could hire a "conscientious lay person" (although the Iowa Nursing Board had ruled directly to the contrary), or that the financial burden of hiring a full-time R.N. was not so great as to require the service to be defined as "medical." Pet. App. 52a-53a. The ALJ also said that Iowa law required the District to pay for the nursing services as "corrective and supporting services." Pet. App. 54a.

E. The Federal Court Proceedings.

The District then filed an action in federal district court to review the ALJ's decision under 20 U.S.C. § 1415(e), requesting declaratory relief that "it is not required under either [the IDEA] or the Iowa Special Education laws" to provide the continuous one-on-one nursing services to Garret. On cross-motions for summary judgment, the district court granted summary judgment for Garret and his mother. The court ruled as a matter of law that the "medical services" exclusion in the Act "is limited to the services of a physician or hospital." Pet. App. 15a. The district court did not consider the nature or extent of the

[5] The ALJ had published an article the previous year which took the same position. Larry Bartlett, *"Economic Cost Factors in Providing a Free Appropriate Public Education for Handicapped Children: The Legal Perspective,"* 22 J.L. & Ed. 27, 55-56 (1993).

services or the burdens upon the District; nor did the district court consider the state law issues.[6]

The District appealed, and the Eighth Circuit Court of Appeals affirmed in an opinion adopting the same physician/non-physician distinction. The Eighth Circuit read this Court's decision in *Tatro* as "establish[ing] a bright-line test: the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not." Pet. App. 6a. The Eighth Circuit recognized that "several decisions . . . have not interpreted *Tatro* as establishing a bright-line, physician/non-physician test for medical services," and have instead factored into the analysis "considerations of the nature and extent of the services performed." Pet. App. 6a-7a (citing cases). The Eighth Circuit declined to follow those cases, concluding that it was bound by what it understood the holding in *Tatro* to be, "[r]egardless of whether we agree with this reading of the statute and the regulation." Pet. App. 6a. The District petitioned for certiorari to this Court. This Court granted the petition.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (the "IDEA") does not require Cedar Rapids Community School District to hire a specially-trained nurse to attend continuously and exclusively to Garret F.'s health-care needs while he is at school. To require local school districts to provide intensive, continuous one-on-one nursing

[6] The district court's opinion incluudes a "But see" citation to *Neely v. Rutherford County School*, 68 F.3d 965 (6th Cir. 1995), one of the cases that used a practical, balancing approach to determine the scope of the "medical services" exclusion. Pet. App. 15a. Contrary to the suggestion of the Solicitor General at the petition stage, this confirms that the district court did *not* apply a balancing approach or find that Garrett F. would have prevailed under such an approach.

services as part of their "free and appropriate public education" mandate would undermine the literal language and the basic purpose of the federal law. The IDEA is an *education* law. Although it requires schools to provide certain "related services" as part of their mandate to provide special education, those services are enumerated, they do not include intensive nursing services, and they specifically exclude "medical services" except for evaluation and diagnosis. 20 U.S.C. § 1401(a)(17).

The term "medical" in the IDEA should have a plain, common-sense meaning, as it does when used in other federal statutes and in other contexts. "Medical" services do not have to be directly administered by a licensed physician, but can be furnished by other competent health care providers. Congress has considered and clarified the definition of "related services" several times when it amended the IDEA, and has made specific additions to the list of related services. However, Congress has never altered the original "medical services" exclusion, even though Congress was undoubtedly aware of several federal court precedents excluding one-on-one nursing services from the scope of the IDEA services.

Until this case, the pronouncements by the Department of Education also favored a common-sense definition of "medical services," not a formalistic definition turning on whether the person providing the service happened to be a licensed physician. As recently as 1996, two interpretive letters rejected a bright-line physician/nonphysician distinction and stated that private duty-type nursing services could be excluded from the coverage of the Act.

This Court's prior decisions in *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982), and *Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984), also lead to the conclusion that local school districts are not required to provide continuous one-on-one nursing services as part of their federal special education mandate. *Rowley* establishes two

key principles: first, that the IDEA was not intended to impose inflexible rules on states and localities; and, second, that the IDEA is "in the nature of a contract" between the federal government and the states, and that any requirements on states and localities must be spelled out "unambiguously." If Congress desired to have *only* physician services excluded from district responsibility, rather than all medical services, Congress could have clearly and easily stated this intent.

In *Tatro*, this Court held that school districts can be required to provide intermittent health-care related services, such as clean intermittent catheterization ("CIC"). CIC needed to be administered only once a day, could be administered by an existing school nurse, and was similar to services already provided by school nurses. In short, the same practical, flexible approach of *Tatro* that favored a finding that CIC is *included* in "related services" favors a finding of *exclusion* of continuous one-on-one nursing services here.

Ultimately, the question of whether health care services must be provided by a school district should not be decided by a mechanical physician/nonphysician test. Rather, the outcome should depend upon a series of factors, such as whether the care is continuous or intermittent, whether existing school health personnel can provide the service, the cost of the service, and the potential consequences if the service is not properly performed. Indeed, until the lower courts' decisions in this case, the vast majority of federal courts had followed just this approach. This multifactor test enhances the goal of the IDEA, which is to ensure that *all* disabled children receive a free appropriate public education by allocating scarce resources to education and education-related services, while utilizing other resources for medical services.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE IDEA AND ITS LEGISLATIVE HISTORY CALL FOR ALL MEDICAL SERVICES, NOT JUST THOSE DIRECTLY PROVIDED BY A PHYSICIAN, TO BE EXCLUDED FROM THE SCHOOL DISTRICT'S RESPONSIBILITY.

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (the "IDEA" or "Act")[7] serves the laudable goal of assuring that every disabled child will receive a free appropriate public education including "special education and related services" suitable to him or her. *Id.* § 1400(c). "Related services" are defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education. . . ." *Id.* § 1401(a)(17). The Act requires that these services be free of charge to the student. In return, the federal government provides assistance to the States, currently paying approximately seven percent of the costs of educating disabled children, leaving the States and local school districts to shoulder the rest of the costs. Chambers, Parrish, Lieberman & Wolman, "*What Are We Spending on Special Education in the U.S.?*" Center for Special Education Finance (funded by Office for Special Education Programs, Department of Education), Brief No. 8, February 1998.

However, consistent with the notion that the IDEA is about education, and is not a broader law requiring school districts to meet every daytime life-sustaining need of every student within their boundaries, the Act expressly excludes "medical services" from the "related services"

[7] When first enacted in 1975, the Act was known as the Education for All Handicapped Children Act. See Pub. L. 94-142, 84 Stat. 175. For convenience, this brief will refer to the Act as the Individuals with Disabilities Education Act or the "IDEA," the name it has had since 1990.

which must be provided by school districts. 20 U.S.C. § 1401(a)(17). School districts only have to provide and pay for medical services "for diagnostic and evaluation purposes." *Id.*

Garret, a 15-year-old ventilator-dependent child, requires the continuous assistance of medically trained personnel to attend to his medical needs. Without this assistance, Garret could suffer respiratory distress and be in a life-threatening medical condition. By any common-sense definition of "medical services," the intensive, one-on-one full-time nursing care that Garret needs to stay alive is a "medical" service. These same nursing services needed at both home and at school have been paid for by private health insurance as "medical services." J.A. at 12; TR at 129. Nonetheless, the District has been ordered to pay for these services at school because the courts below concluded that "medical services" means only those services "directly administered by a physician." Pet. App. 6a-7a.

Neither the express language of the Act, the legislative history of the Act, the Department of Education's regulations or interpretations, this Court's prior decisions, the majority of other courts' decisions, nor any other reliable source of statutory interpretation supports this unduly narrow definition of excluded medical services. To the contrary, the only logical interpretation of the Act favors a practical, common-sense application of the "medical services" exclusion so as to exempt school districts from having to pay for continuous one-on-one nursing services.

A. The Express Language of the IDEA Favors a Common-Sense Definition of Medical Services.

In interpreting a statute, the cardinal rule is first to examine the plain and ordinary meaning of the words of the statute. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989). The language in the IDEA is clear: it expressly excludes *all* "medical services," except

those that are for diagnostic and evaluation purposes. As this Court has frequently reiterated, "[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters v. Metropolitan Educational Enterprises*, 117 S. Ct. 660, 664 (1997) (quoting *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993)). The term "medical services" is simply not understood in common parlance to mean only those services provided by a physician, but is instead understood to embrace a broad range of services related to diagnosing, curing, mitigating, or preventing a disease or other health-related condition. The phrase typically has this same meaning when used in other legislation. *See, e.g.*, 26 U.S.C. § 213(d) (definition of "medical care" in the Internal Revenue Code). Had Congress intended to exclude only those medical services directly administered by physicians, it could have simply said "except physician services" or "except doctor's services."

Congress was well aware of what "medical" meant when it adopted the Act in 1975. In just the previous decade, Congress had enacted sweeping Medicaid legislation as Title XIX of the Social Security Act which expressly defined "medical assistance" as including an ambit of medical services going well beyond those administered directly by licensed physicians. 42 U.S.C. § 1396d(a). The Internal Revenue Code had long defined "medical care" as amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting the structure or function of the body. . . ." 26 U.S.C. § 213(d)(1). No one has ever seriously contended that the Tax Code's medical expense deduction is limited to amounts paid to physicians. The Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq.*, employs a similar definition for determining what drugs and "medical devices" are subject to the regulation of the Act. *See* 21 U.S.C. § 321.

Likewise, there is a large body of precedent in other contexts holding that "medical" services are not only rendered by physicians. *See, e.g., Moore v. Metropolitan Life Ins. Co.*, 307 N.E.2d 554 (N.Y. 1973) ("medical services . . . obviously may be performed by any of a number of professionals or paramedical personnel"); *Warren Tucking Co. v. Chandler*, 277 S.E.2d 488, 492 (Va. 1981) (ordinarily nursing services are among the "medical" benefits that employers and workmen's compensation carriers must provide); *State ex rel. Multimedica, Inc. v. Snowden*, 647 N.E.2d 1374, 1378 (Ohio 1995) ("medical" refers to the science and art of the investigation, prevention, cure and alleviation of disease); *State v. Robinson*, 735 P.2d 801, 809 n.9 (Ariz. 1987) ("medical" providers include psychologists).

B. Congressional Findings and the Structure of the IDEA Emphasize that Schools Are to Utilize Their Resources for Educational Services While Other Providers Are Responsible for Medical Services.

The Congressional findings in the IDEA emphasize that the Act is intended to provide assistance to States in making provision for *educational* services:

> The Congress finds that—
>
> (3) more than half of the children with disabilities in the United States do not receive appropriate *educational* services which would enable them to have full equality of opportunity. [20 U.S.C. § 1400 (b)(3) (emphasis added).]

The Congress reinforced and strengthened the emphasis on educational services in 1997 when it reauthorized and amended the Act:

> The Congress finds the following:
>
> (1) . . . Improving *educational* results for children with disabilities is an essential element of our national policy . . .

(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) . . .

(3) more than one-half of the children with disabilities in the United States did not receive appropriate *educational* services that would enable such children to have full equality of opportunity.

(5) Over 20 years of research and experience has demonstrated that the *education* of children with disabilities can be made more effective by—

. . .

(G) Focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving *educational* results.

(6) While States, local educational agencies and educational service agencies are responsible for providing an *education* for all children with disabilities it is in the national interest that the Federal Government have a role in assisting State and local efforts to *educate* children with disabilities in order to improve results for such children and to ensure equal protection of the law. [IDEA Amendments of 1997, Pub. L. 105-17, Title I § 601, 111 Stat. 37, to be codified at 20 U.S.C. § 1400(c) (emphasis added).]

Consistent with the theme that school districts are to devote their resources to *education*, the Act also requires educators to *coordinate* with other government agencies in providing noneducational services that children may need. While the Act holds schools responsible for providing a free appropriate public education, including special education instructional and related services, see 20 U.S.C. §§ 1412(2)(B) & 1401(a)(18), it also specifically states that the Act does not relieve any other agency of its obligations to provide other services, or indeed to pay for certain related services (such as physical therapy and counseling). 20 U.S.C. § 1412(6). In fact, the Act requires states to enter into interagency agreements that define the financial responsibilities of the various agencies.

20 U.S.C. § 1413(a)(13). This language was further strengthened by the 1997 Amendments. Pub. L. 105-17, Title I § 612, 111 Stat. 60 to be codified at 20 U.S.C. §§ 1412(a)(11)(B) & 1412(a)(12).

Moreover, Congress specifically used the same term—"medical" services—elsewhere in the Act, to emphasize that other agencies remain liable for such costs:

> Nothing in this title permits a State to reduce *medical* and other assistance available, or to alter eligibility, under Titles V and XIX of the Social Security Act with respect to the provision of a free appropriate public education for children with disabilities in the State. [Pub. L. 105-17, Title I, Sec. 612, 111 Stat. 60, to be codified at 20 U.S.C. § 1412(e) (emphasis added)]

It would be illogical for Congress to state in one section of the law that other agencies retain responsibility for "medical" services which are broadly defined in Titles V and XIX, and then to give a narrow interpretation to excluded "medical" services in another section of the same law that would result in school districts assuming this responsibility.

Congress clearly originally intended, and has since reemphasized the intent, that schools are to utilize their resources for educational purposes and are not required to undertake financial responsibility for many other services, even if necessary for a child to benefit from the educational services offered by the District. This philosophy is present in the definition of "related services," where medical services are excluded except for diagnostic and evaluation purposes. Congress thus *explicitly* rejected the concept that "medical services" should be paid for by school districts, even though such services may be required to assist a child with a disability in receiving an education. 20 U.S.C. § 1401(a)(17).

C. Legislative Amendments to the IDEA Demonstrate that Congress Intended a Common-Sense Interpretation of Excluded Medical Services.

When Congress has been dissatisfied with the scope of free services being provided by school districts to disabled students under IDEA, it has not hesitated to say so explicitly. For example, in 1990, Congress expressly expanded the definition of required "related services" to include "social work services" and "rehabilitation counseling," but did nothing to affect the existing statutory definition of "medical services." Congress added the "social work services" and "rehabilitation counseling" provisions because, according to the House Committee Report, it had received reports that these services were not uniformly provided, even though the regulations or prior committee reports had directed that local school districts provide them. H. Rep. No. 101-544 at 7 (1990). Accordingly, Congress felt it was necessary to "clarify" this aspect of the IDEA. *Id.*

By contrast, Congress did not narrow or "clarify" the "medical services" exclusion in 1990 even though there was a published and well-publicized opinion holding one-on-one nursing services to be excluded medical services. *Detsel v. Board of Educ. Of Auburn Enlarged City School Dist.*, 820 F.2d 587 (2nd Cir.) (per curiam), *cert. denied*, 484 U.S. 981 (1987). Another district court had also exempted a school district from having to provide continuous one-on-one nursing services. *Bevin H. v. Wright*, 666 F. Supp. 71 (W.D. Pa. 1987).

Indeed, the 1990 amendments to the IDEA confirm that Congress did not want the Act to become more than an education law. In adding a definition of "transition services" (to assist disabled students about to leave school), the House Committee emphasized that schools should not be "asked to do what they are not intended to do." H. Rep. No. 101-544 at 11 (1990).

Nor did Congress, as recently as June of 1997, amend or "clarify" the term "medical services" when it passed the reauthorized IDEA, even though it was aware that most lower courts, including three circuit courts, had interpreted the term as excluding one-on-one nursing services. Pub. L. 105-17, Title I § 602, 111 Stat. 42, to be codified at 20 U.S.C. § 1401(22). Rather, the emphasis is even stronger now upon providing necessary *educational* services, so that disabled children have an opportunity to attend school, while at the same time sparing school districts from having to undertake non-educational expenses.

D. The Costs of Providing Continuous One-On-One Nursing Services to Garret Are Significantly Beyond the Educational Resources the District Is Required to Expend.

Congress has also recognized that the federal financial contribution to the education of disabled students is limited, and therefore the burdens imposed on local school districts must have some limits as well. In 1994, the federal government's share of funding for special education services was only $413 for each child served. *Eighteenth Annual Report to Congress on the Implementation of the IDEA*, U.S. Department of Education (1996). In Iowa, none of this funding goes directly to local school districts.

At the time of the 1994 administrative hearing in this case, the District received approximately $12,780 in state and local income and property taxes on account of Garret's enrollment, an amount that is supposed to provide sufficient resources for educational and related services for someone of Garret's level of disability. TR at 513-514. The District expends funds not only for the regular educational and activity programs for Garret, but also for his educational associate, his special transportation, and his computer equipment. Pet. App. 34a-36a. Thus, even without taking into account Garret's need for continuous nursing services, the funding for his needs is inadequate.

Hiring a nurse to care for Garret from the time he left home on the bus until he returned home would have cost between $28,630 and $39,810. J.A. at 15. There was no dispute in the record that nurses hired in Cedar Rapids are registered nurses carrying a bachelor of science degree. J.A. at 17. The variation in estimates was based upon whether a nurse with no experience could be hired or a typical nurse employed in the District with ten years experience. This cost estimate was consistent with cost estimates of one-on-one nursing services in other cases where courts have declined to impose the costs on the school district. In *Ellison v. Board of Educ. of Three Villages Central School Dist.*, 597 N.Y.S. 2d 483 (App. Div. 1993), it was estimated that the cost of one-on-one nursing would be $25,000 to $40,000. In *Granite School Dist. v. Shannon M.*, 787 F. Supp. 1020 (D. Utah 1992), it was estimated to be approximately $30,000, and in *Fulginiti v. Roxbury Tp. Public Schools*, 921 F. Supp. 1320 (D.N.J. 1996), *aff'd, without published opinion*, 116 F.3d 468 (3rd Cir. 1997), the costs were estimated to be $56,000.

If Congress had intended that school districts were to provide for costly private nursing services, such as Garret requires, it would have specifically stated so in its definition of "related services," just as it did for other potentially expensive services, such as physical and occupational therapy. Instead, Congress chose to specifically exclude "medical services" unless for diagnostic or evaluation purposes. If public school entities are to use their limited resources to fund such expensive individualized nursing services, then that should be required by specific Congressional action rather than by a narrow interpretation of the term "medical." This Court has repeatedly stated that if Congress desires to condition states' receipt of federal funds, it must do so unambiguously. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *New York v. United States*, 505 U.S. 144, 172 (1992). *See*

Gebser v. Lago Vista Independent School Dist., S. Ct. No. 96-1866 (June 22, 1998), slip op. at 10-12 (Title IX scheme, imposing conditions on receipt of federal funds, requires careful scrutiny to ensure recipients had clear notice of nature and scope of conditions). *Accord Commonwealth of Virginia, Dept. of Ed. v. Riley*, 106 F.3d 559, 560-61 (4th Cir. 1997) (applying this principle to the IDEA). Indeed, in *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 190 n.11 (1982), discussed below, this Court described this proposition as "fundamental." This proposition should be especially true when, as here, Congress is paying only about seven percent of the costs of the program.

II. THE DEPARTMENT OF EDUCATION'S REGULATIONS AND INTERPRETATIONS DO NOT SUPPORT AN UNDULY RESTRICTIVE DEFINITION OF THE MEDICAL SERVICES EXCLUSION.

The Department of Education regulations implementing the IDEA do not address the question at issue in this case: what medical services are excluded from a school district's responsibility under 20 U.S.C. § 1401(a)(17). The regulations *do* define covered medical services for which a district *is* responsible, *see* 34 C.F.R. § 300.16(b)(4), but that is a different question. There is no basis for inferring that it is the Department's considered view that any type of service that does not fit within its definition of a *covered* medical service is not a medical service at all, and therefore not subject to the medical services exclusion. In fact, as detailed below, the available evidence confirms that such an inference is not the Department's position.

The Department's regulations, which date back to 1977 with relatively minor modification, define the term "related services" as follows:

> The term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a dis-

> ability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training. [34 C.F.R. § 300.16(a)]

"School health services" are separately defined in § 300.16(b)(11) as "services provided by a qualified school nurse or other qualified person." Lastly, 34 C.F.R. § 300.16(b)(4) defines *covered* "medical services" as "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." There is no definition of excluded medical services.[8]

Thus, the regulations leave the critical question in this case—the definition of *excluded* medical services—unanswered. As the Solicitor General acknowledged in the brief filed at the petition stage, "the regulations expressly define only those medical services that *are* owed to handicapped children. . . ." SG Br. 3 n.2 (emphasis in original). Simply because the Department of Education has concluded that the covered medical services of diagnosis and evaluation are to be provided by a physician does not mean that the only excluded medical services are those similarly provided by a physician. It may make sense, in considering the covered services of diagnosis and evaluation, to conclude that such services should be provided by

[8] The Department of Education has published proposed rules to implement the 1997 Amendments to IDEA. 62 Fed. Reg. 204 (October 22, 1997). The proposed regulations do not alter the provisions relevant to this case, but merely replace the term "speech pathology and audiology" with "speech language pathology and audiology services" and add "orientation and mobility services," in order to conform to statutory changes.

a physician. But that hardly suggests that there can be no such thing as a medical service that is not provided directly by a physician.[9]

The definition of "school health services" in the regulations as "services provided by a qualified school nurse or other qualified person" is of no help to Respondent. Since the regulation clearly does not mean that *all* requested services must be provided by the district, it is most reasonably read as providing that the term "school health services" encompasses services *analogous to* those traditionally provided by school nurses. In other words, school districts do not have to provide services that significantly differ in nature and magnitude from traditional "school health services." As discussed below, this Court in *Tatro* took that approach.

Thus, nothing in the regulatory definition of "school health services" suggests that the intensive, one-on-one care required by Garret F. is the responsibility of the School District, and nothing in the regulatory definition of covered medical services suggests that this care is not within the medical services exclusion.

In any event, the Department of Education has not previously taken the position that its regulations require school districts to bear the expense of every student-related medical treatment that was not directly administered by a physician. Indeed, in 1981, the Secretary of Education expressly acknowledged that the Department's regulations in this area were "ambiguous." In postponing an interpretive ruling he had planned to deliver on clean inter-

[9] In *Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 893 (1984), this Court stated that the regulation "presumably . . . means that 'medical services' *not* owed under the statute are those 'services by a licensed physician' that serve other purposes" (emphasis in original). The Court cited no authority for its presumption that "medical" really means "physician," and this was not critical to the *Tatro* finding.

mittent catheterization ("CIC") (the service involved in *Tatro*), the Secretary stated:

> The Secretary is also concerned that the differentiation between related services and medical services be clarified. The Secretary declines to issue an interpretation based on regulations that are *ambiguous* and subject to review. [46 Fed. Reg. 25614 (1981) (emphasis added)]

The following year, the Secretary proposed additional regulations in six general areas of the IDEA, including the related services/medical services distinction. The Secretary's notice of proposed rulemaking reiterated the perceived ambiguities in the original regulations::

> In recent years, school officials and parents have pointed out problems in the implementation of the current statutory and regulatory requirements concerning related services. *The most persistent problems involve determining whether certain health-related services are to be provided.* [47 Fed. Reg. at 33837 (1982) (emphasis added)]

Among other things, the Secretary's 1982 proposed rules would have expressly exempted school districts from providing "life-sustaining procedures that . . . must be administered by specially-trained, licensed health care professionals. . . ." *Id.* at 33846. In short, the 1982 proposed rules would even have excluded procedures that could be done on an intermittent basis by school nurses, such as clean intermittent catheterization. As the government correctly noted in its brief at the petition stage, the Secretary's wide-ranging notice of rulemaking provoked opposition in Congress and was later withdrawn. The Secretary announced plans to issue a new notice of proposed rulemaking, but did not do so. 47 Fed. Reg. 49871 (1982). In 1983, Congress then added a largely symbolic provision to the IDEA prohibiting the Secretary from implementing any regulation which:

> would procedurally or substantively lessen the protections provided to children with [disabilities] under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timeliness, attendance of evaluation personnel at individualized educational program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation. [20 U.S.C. § 1407(b)]

Yet nothing in this debate from the early 1980's suggests that either the Department of Education or Congress envisioned a rule limiting the medical services exclusion to physician services. At the time, the greater debate about medical services revolved around individualized services which a school nurse could provide to disabled children while performing other normal duties for several hundred students. (*Tatro* was decided the following year.) None of the debate centered on a discussion of one-on-one private-duty nursing. The foregoing thus hardly supports the Solicitor General's extravagant assertion in his brief at the petition stage that Congress has somehow endorsed a non-existent regulatory position that such care was the responsibility of a school district under the Act.

The United States Department of Education has issued a number of interpretive letter rulings regarding the issue of what constitutes a medical service under the Act, including two letter rulings on nursing services.[10] These interpretations have not applied a bright-line distinction

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[10] See *Hehir to Anonymous*, 25 Individ. Disab. Educ. L. Rep. 531 (November 13, 1996); *Hehir to Anderson*, 24 Individ. Disab. Educ. L. Rep. 180 (February 22, 1996); *Guard to Del Polito*, Educ. Handicap L. Rep. 211:392 (June 24, 1986); *Irvin to Millman*, Educ. Handicap L. Rep. 211:104 (May 22, 1979); *Tyrrell to Janda*, Educ. Handicap L. Rep. 211:205 (January 25, 1979); *Irvin to Minsky*, Educ. Handicap L. Rep. 211:19 (April 7, 1978).

of whether the services are performed by physicians or nonphysicians.

Most recently, the agency clearly renounced any "bright-line" physician/nonphysician test. *Hehir to Anderson*, 24 Individ. Disab. Educ. L. Rep. 180 (February 22, 1996), Pet. App. 64a-67a. The Director of the Office for Special Education Programs ("OSEP") was specifically asked for the first time whether one-to-one nursing services necessary for a student to attend a public school setting were the responsibility of a school district. The agency specifically rejected the "bright-line" analysis and instead said that each case had to be determined on a case-by-case basis in light of the particular facts and circumstances involved. For this reason, OSEP refused to express any "view as to whether or not 'one-to-one nursing' services are a required related service for an individual disabled student." Pet. App. 67a. The agency carefully made a distinction between whether the required care was *intermittent* and could be provided by a *regular* school nurse or whether the care was continuous and was more in the nature of private duty nursing:

> A threshold issue raised by your inquiry is whether "one-to-one nursing services" to enable a disabled student to attend school would be considered an eligible "school health service," or an excluded "medical service" because the services are for purposes other than those that are "diagnostic and evaluative in nature." 34 CFR § 300.16(b)(4) and (b)(11). Courts that have addressed this issue have reached differing conclusions based on factors such as the nature and intensity of the nursing services required for a particular student and the level of skill required of the individual performing the services. If the care required is intermittent and could be provided by a regular school nurse, courts have generally held that the service is an eligible related service. *See e.g., Irving Independent School District v. Tatro*, 104 S. Ct. 3371 (1984), *Department of Education, State of Hawaii v. Katherine D*, 727 F.2d 809 (9th Cir. 1984), *cert. den.* 471 U.S. 1117 (1985) and *Macomb County Intermediate School District v. Joshua S*, 715 F. Supp. 824 (E.D. MI. 1989). However, if the care required is continuous, courts relying on the private duty aspect of the services, generally have held that the service is an excluded medical service. *See e.g., Neely v. Rutherford County School District*, 68 F.3d 965 (6th Cir. 1995); *Detsel v. Board of Education of Auburn Enlarged City District*, 637 F. Supp. 1022 (N.D. N.Y. 1986) *Aff'd per curiam*, 820 F.2d 587 (2d Cir. 1987), *cert. den.* 484 U.S. 981 (1987); *Granite School District v. Shannon M.*, 787 F. Supp. 1020; (D. Utah 1992) and *Bevin H. v. Wright*, 666 F. Supp. 71 (W.D. Pa. 1987).

Later in 1996, the Department of Education again made the distinction between intermittent care which could be provided by a regular school nurse and continuous care which was more in the nature of private duty nursing in another letter ruling. *Hehir to Anonymous*, 25 Individ. Disab. Educ. L. Rep. 531 (November 13, 1996).

Therefore, since the original passage of the IDEA in 1975, and continuing to this date, there has been no regulatory definition of excluded "medical services," and there has been only a general definition of required "school health services." At the same time, the interpretations by the agency itself have rejected a bright-line rule in favor of a case-by-case analysis.

III. THIS COURT'S PRIOR DECISIONS REQUIRE THAT THE IDEA, INCLUDING THE MEDICAL SERVICES EXCLUSION, BE INTERPRETED IN A PRACTICAL, COMMON-SENSE MANNER, AN APPROACH FOLLOWED IN MOST SUBSEQUENT LOWER COURT DECISIONS.

A. This Court's *Rowley* Decision.

This Court's decision in *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982), provides the starting-point for examining judicial

interpretations of the IDEA. In *Rowley*, this Court's first decision under the IDEA, this Court considered whether school districts had to provide every service that was needed to give a disabled child an opportunity "commensurate with the opportunity provided other children." *Id.* at 198 (quoting the district court). The parents in *Rowley* sought to require the school district to provide a sign-language interpreter for their partially deaf child, arguing an interpreter was needed to equalize their daughter's opportunities with those of nondisabled children even though she was performing well in school. *Id.* at 185-86.

The Court rejected the parents' argument, holding that the Act did not require any particular level of educational benefits. *Id.* at 202-203. The Court expressly rejected the notion that school districts were obligated by the Act to "maximize each child's potential," regardless of burden or cost. *Id.* at 204 n.26. Instead, the facts in each case had to be weighed individually. *Id.* at 202-203. Accordingly, it reversed the lower court rulings that required Amy Rowley to be provided with a sign language interpreter while attending school.

Rowley repeatedly emphasizes Congress's desire to afford states flexibility in meeting the requirements of the IDEA. Congress did not impose "a burden of unspecified proportions and weight" when it enacted the IDEA. 458 U.S. at 190 n.11. The IDEA does not "guarantee any particular level of education," and imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education. . . ." *Id.* at 192, 195. One cannot square these kinds of statements, and *Rowley*'s rejection of bright-line rules, with a bright-line rule that school districts provide nursing services regardless of burden or cost.

B. This Court's *Tatro* Decision.

Practical considerations also guided this Court in *Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984), its only prior decision addressing the "related

services" and "medical services" definitions. In *Tatro*, this Court generally adopted a flexible approach in ruling for a school-age child with spina bifida who needed clean intermittent catheterization ("CIC") every three or four hours. The CIC procedure, according to the Court, was "a simple one that may be performed in a few minutes by a layperson with less than an hour's training." *Id.* at 885. Indeed, the Court noted that Amber Tatro would soon be able to perform the procedure herself. It was also undisputed that state law did not require even a nurse to perform this simple procedure. *Id.* at 887. Under these circumstances, this Court held that the school district should provide the service. This Court's reasoning had two components:

(1) CIC is analogous to the type of services that school nurses have traditionally provided to nondisabled students, such as dispensing oral medications and giving emergency injections. In other words, CIC "services [are] of a kind that are routinely provided to the non-handicapped." *Id.* at 893-894.

(2) While one could conclude that Congress wanted "to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence," it was also logical to conclude that "Congress intended to impose the obligation [on schools] to provide school nursing services." *Id.* at 892-893.

In short, this Court found that CIC, a simple procedure that needed to be performed only once during the school day by a school nurse who was not thereby precluded from performing services for other children, was a "related" service analogous to traditional school nursing services (like administering insulin shots for a diabetic child) and not an excluded "medical service." [11]

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[11] The Cedar Rapids Community School District currently provides intermittent catheterization for approximately five students. TR at 287. By way of contrast, the District does not provide continuous nursing services for any student.

As in *Rowley*, this Court in *Tatro* largely followed a balanced, nuanced approach, carefully considering the burdens on the school district. *Id.* at 893-894. Some language in *Tatro* does support a bright-line physician/nonphysician rule, such as the Court's statement that the Secretary of Education "limit[ed] the 'medical services' exclusion to the services of a physician or hospital," *Id.* at 893. *See* Haekyoung Suh, Note, "*The Need for Consistency in Interpreting the Related Services Provision Under the Individuals With Disabilities Education Act*," 48 Rutgers L.J. 1321, 1325-26 (1996) (discussing the two sides to *Tatro*). Yet even here, the Court noted in the same sentence that physician services are "far more expensive" than school nursing services. *Id.* at 893. That was true when considering the time of a school nurse to administer a simple procedure once a day. Continuous, one-to-one nursing services of the sort at issue here are in fact much more expensive than an office visit to a physician.

Significantly, in *Tatro* the parents, not the school district, were advocating a flexible approach. The school district argued for a formalistic interpretation of the IDEA that characterized CIC as a medical service because it had to be prescribed by a physician, even though it only needed to be administered once a day. The parents argued for a more practical approach, contending that CIC was not a genuine medical service because, among other circumstances, Amber Tatro would soon be able to administer it to herself.

C. Lower Court Decisions on the "Medical Services" Exclusion, Until This Case, Have Almost Without Exception Favored a Practical Approach.

Until the decisions in this case, almost all lower courts, as well as state administrative hearing officers, had read *Tatro* as endorsing a pragmatic and balanced definition of "medical services." Indeed, at least five previously reported federal court decisions concluded that continuous

one-on-one nursing services were an excluded "medical service" under the IDEA. This suggests that this opinion in *Tatro* clearly favored such an approach, and that such an approach makes sense given the intensive nature of the services involved.

In *Clovis Unified School Dist. v. California Office of Admin. Hearings*, 903 F.2d 635, 644 (9th Cir. 1990), the Ninth Circuit addressed whether a child's residential placement was an excluded "medical service" and concluded that it was. As the court stated:

> [*Tatro*] held only that services which *must* be provided by a licensed physician, other than those which are diagnostic or evaluative, *are* excluded and that school nursing services of a simple nature are not excluded. In reaching this decision the Court considered the extent and nature of the services performed, not solely the status of the person performing the services.

The Ninth Circuit added, "[I]t would do havoc to the structure of the Act to exclude only the services of licensed physicians . . ., and to require the school district to pay for all other services." *Id.* The court also rejected a rule that would require school districts to pay for all services that are "*supportive* of a handicapped child's education." *Id.* at 643 (emphasis added). The court noted that this test was "far too inclusive . . . in light of the Act's explicit exclusion of medical services," because many medical treatments are "supportive" of education. *Id.*

The Sixth Circuit read *Tatro* similarly in *Neely v. Rutherford County School*, 68 F.3d 965 (6th Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996), a case involving continuous one-on-one nursing services. There the court held that the tracheostomy suctioning and potential ambu bagging services required by Samantha Neely were excluded "medical services." Samantha had a rare condition which required her to breathe through a tracheostomy tube. The tube had to be suctioned and, if her breathing

stopped, artificial ventilation with an ambu bag would have to be provided. Given that a nurse or medical attendant "would have had to devote virtually all of his or her attention" to Samantha, and that "such care was necessary in order to protect" the child's life, the court held that the services her parents sought were "medical" and not "related." *Id.* at 971-973.

In discussing this Court's *Tatro* decision, the Sixth Circuit noted that it was "subject to several interpretations." *Id.* at 970. The Sixth Circuit concluded that "the better interpretation of *Tatro*" is that a school district is not required to provide every service that is "medical in nature," but rather that the burden on the school district must be considered along with the nature and extent of the services. *Id.* at 971.

Likewise, in *Detsel v. Board of Educ. of the Auburn Enlarged City School Dist.*, 820 F.2d 587 (2nd Cir. 1987) (per curiam), *aff'g* 637 F. Supp. 1022 (N.D.N.Y. 1986), *cert. denied*, 484 U.S. 981 (1987), another continuous nursing services case, the Second Circuit held that the daily nursing service for a child who needed constant respirator assistance was an excluded "medical service" and not a covered "related service" within the Act. The court approved the district court's opinion which "gave proper effect to the statuory scheme in balancing the interests of the parties." *Id.* at 588. The district court had found that the "extensive, therapeutic health services sought by the plaintiff on behalf of her daughter more closely resemble the medical services specifically excluded by § 1401(17) of the [IDEA]." 637 F. Supp. at 1027. As the district court explained:

> [T]he *Tatro* decision does not require the provision of all health services, regardless of their magnitude, if performed by one other than a physician. The Supreme Court held only that school nursing services of a simple nature are not excludable as therapeutic "medical services." [*Id.*]

Most recently, in *Fulginiti v. Roxbury Tp. Public Schools*, 921 F. Supp. 1320 (D.N.J. 1996), *aff'd without published opinion*, 116 F.3d 468 (3rd Cir. 1997), the district court, affirmed by the Third Circuit, held that ongoing nursing services for a child with dysfunction of her nervous system were an uncovered "medical service." Carissa Fulginiti had a tracheostomy tube that required monitoring and suctioning during the school day. The court found that "the care required for Carissa is medical in nature and that to provide it would be unduly burdensome upon the District." *Id.* at 1325.

These court of appeals decisions have been joined by federal district court decisions that read *Tatro* similarly. In *Granite School Dist. v. Shannon M.*, 787 F. Supp. 1020 (D. Utah 1992), the district court ruled that full-time nursing care for a child with neuromuscular atrophy and severe scoliosis was not a "related service" under the IDEA which the school district had to provide as part of a free and appropriate public education. The student used a tracheostomy tube that required constant attention; the court reasoned that this constant care could not be provided by the school district's three existing nurses, and that "the Act does not require Granite to provide Shannon with full-time nursing/tracheostomy care as a supportive service." *Id.* at 1030.

In its review of the *Tatro* decision, the court noted:

> The specific holding of *Tatro* is that CIC service is a supportive service not subject to the medical services exclusion of the Act. The court does not read *Tatro* to stand for the proposition that *all* health services performed by someone other than a licensed physician are related services under the Act regardless of the amount of care, expense, or burden on the school system and, ultimately, on other school children. [*Id.* at 1026.]

Accord Bevin H. v. Wright, 666 F. Supp. 71, 74-76 (W.D. Pa. 1987) ("related services" do not include one-

on-one nursing to care for a disabled student with a tracheostomy).

Finally, in *Ellison v. Board of Educ. of Three Villages Central School Dist.*, 597 N.Y.S.2d 483 (App. Div. 1993), a New York appellate court considered a claim brought on behalf of a child who, like Garret, was quadriplegic and ventilator-dependent. The court held that the one-on-one nursing services comparable to those required by Garret were not "simple school nursing services" but rather excluded medical services.

Until this case reached the federal courts, only one post-*Tatro* reported decision had found that "medical services" *were* limited to services directly administered by physicians. *Macomb County Intermediate School Dist. v. Joshua S.*, 715 F. Supp. 824, 828 (E.D. Mich. 1989). Since the Eighth Circuit found for Garret F., two other district courts have adopted this position, while acknowledging that their position is in the minority. *Morton Community Unit School Dist. No. 709 v. J.M.*, 986 F. Supp. 1112, 1119 (C.D. Ill. 1997); *Skelly v. Brookfield LaGrange Park School Dist.*, 968 F. Supp. 385, 394 (N.D. Ill. 1997).

IV. THE NATURE AND EXTENT OF THE SERVICES GARRET REQUIRES, ALONG WITH THE BURDEN ON THE DISTRICT, DEMONSTRATE THAT THE SERVICES HERE CONSTITUTE EXCLUDED MEDICAL SERVICES.

Instead of mechanically following a bright-line physician/nonphysician test, courts should consider several factors in determining whether the services are excluded medical services or included school health services. These factors include the nature and complexity of the care, whether the care is continuous or intermittent, whether existing school health personnel may provide the services, the cost of the services, and the potential repercussions if the services are not properly performed. These can be broadly

summarized as the nature and extent of the care and the burden on the district.

This individualized consideration of needed services for each child fits within the general mandate of the Act that programs for disabled children be developed on an individualized basis. The Act requires that there be individualized consideration of each student's disability, needs, goals and objectives, along with individualized determination of necessary educational, support and related services. 20 U.S.C. § 1401(a)(20). Throughout the Act, there is an emphasis upon recognizing each child's unique needs and necessary services, by using the expertise of the members of the individualized education program ("IEP") team.

The IEP team in Cedar Rapids determined that Garret required care that was beyond the scope of services which could be provided by the Cedar Rapids school nurses. EX 91 at 364-378; J.A. at 14-16. The team made a detailed listing of Garret's health care needs, of the specific interventions required, and of the frequency, and then determined that Garret needed "continuous care by an appropriately licensed practitioner" because Garret "requires continuous monitoring and assessment: highly technical and extensive nature of care, life-threatening prospect of inadequate care, mastery of numerous competencies." EX 91 at 374. All of the participating members of the team, including two school nurses and the school nurse manager, agreed with this assessment, with the exception of Garret's mother, Charlene F. J.A. at 14-16; EX 91 at 365; TR at 331-332, 338, 451-452.

The Iowa Board of Nursing also formally ruled that the care required by Garret could not be delegated to nonlicensed practitioners, such as a trained layperson, because of:

1. The complex nature of the student's care.

2. The number of activities that include the core of the nursing process and require specialized nursing knowledge, judgment and skill.

3. The school nurse/student ratio of 5.8/17,500 which severely limits the amount of training and supervision the registered nurse would be able to provide the nonlicensed personnel.

4. The absence of a school nurse in the building at all times. At times, the nurse may be 30 minutes away.

5. The potential risk of serious harm/injury to the student if he does not receive adequate care. [EX 125 at 456.]

Dr. Reinertson, Garret's personal physician, felt that a trained nonlicensed person could perform the services, as long as a licensed person was readily available by telephone. J.A. at 4-10. However, Dr. Reinertson also agreed that the requirements of the Iowa Board of Nursing are mandatory no matter what he believes. TR at 60.

All of the professionals, including Garret's doctor, agreed that Garret needed continuous care by a trained individual, not just a classroom teacher or by a school nurse responsible for an entire school of children. EX 91 at 364-388. As Dr. Reinertson wrote to the District: Garret should "never" be left unattended. "Someone should always be within hearing distance to respond to Garret's most basic needs and ventilator alarms." EX 91 at 388; TR at 408-09.

However, neither this case, nor any future case involving needed nursing services, necessarily depends on State licensure requirements for nurses. Whether a registered nurse with a bachelor's degree is required, or a registered nurse from a two-year program, or a licensed practical nurse, or a nonlicensed nurses aide, is irrelevant to a determination of whether the nursing services constitute excluded "medical services."

The courts which have previously considered whether one-on-one nursing services constitute medical services did not need to make distinctions based upon licensure. In *Detsel v. Board of Educ. of Auburn Enlarged City School Dist.*, 637 F. Supp. 1022 (N.D. N.Y. 1986), *aff'd*, 820 F.2d 587 (2d Cir.) (per curiam), *cert. denied*, 484 U.S. 981 (1987), the school physician testified that Melissa Detsel would require the services of either an LPN or a registered nurse. In *Fulginiti v. Roxbury Tp. Public Schools*, 921 F. Supp. 1320 (D.N.J. 1996), *aff'd without published opinion*, 116 F.3d 468 (3rd Cir. 1997), Carissa Fulginiti received the services of a licensed practical nurse under the federally funded Medical Assistance Program; the court found that even services provided by a lay person may qualify as excluded medical services. Similarly, the student in *Granite School Dist. v. Shannon M.*, 787 F. Supp. 1020 (D. Utah 1992), was receiving the services of a licensed practical nurse, as was the student in *Spencerport Central School Dist.*, 16 Educ. Handicap L. Rep. 1042 (NY Comm'r Educ. 1990). In *Glen Rock Board of Educ.*, 16 Educ. Handicap L. Rep. 1102 (NJ Admin. ALJ 1990), a state administrative law judge ruled that the services of a trained aide for a single student were excluded medical services. In *Neely v. Rutherford County School*, 68 F.3d 965 (6th Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996), there was some argument over the licensure requirement for Samantha Neely's care, but it was agreed that Samantha required at most a licensed practical nurse; the Sixth Circuit Court of Appeals held that even if services could be provided by a nonlicensed nursing assistant, they will still be excluded medical services. *Id.* at 971.

While the administrative law judge placed primary reliance on a bright-line, physician/nonphysician distinction, he also indicated that if he were to use such a balancing test, the continuous nursing services required by Garret would be related services. Pet. App. 52a-53a. He

based this apparently upon a finding that students in some of the other cases were more "fragile." He stated:

> [w]hile Garret needs much in the way of the same health care services as the students in those cases, his general good health, ability to communicate his needs, intelligence and other factors weigh heavily in distinguishing him from the students in these rulings. Clearly, the students in *Detsel, Bevin H.*, and *Shannon M.* were more fragile in the true sense of the word. While testimony differed at the hearing as to the proper level of licensure needed by the person to care for Garret at school, it was obvious that in most situations a conscientious lay person could be, and has been in the past, trained to provide the necessary care. Unless Garret's situation changes in the future, such as a reoccurrence of antonemic (sic) hyperreflexia, which may need assessment of a professional nature on a reoccurring basis, there appears no practical need for Garret to be attended by even a licensed health care professional. [Pet. App. 52a.]

The administrative law judge then concluded that the additional $20,000-30,000 cost was not unduly burdensome. Pet. App. 53a.

However, this was not a true balancing test, but merely a comparison of Garret's case to some prior reported decisions. The administrative law judge failed to acknowledge that in all of these cases the need for one-on-one private duty type nursing was a determining factor. In all of these cases there was a need for an individual to exercise professional judgment in determining whether the student was in distress; in all of these cases there was the possibility of death for the student if the student was not properly administered health care services; and in all of these cases there were significant costs to the districts in hiring a trained person because existing school nursing services would be inadequate to provide for the student who needed continuous care. These are exactly the same features of

Garret's situation. Even Garret's mother and physician indicated Garret had and could continue to suffer episodes of autonomic hyperreflexia, which if not immediately alleviated, could lead to his death, necessitating continuous monitoring. EX 50 at 174-175, 179; EX 91 at 386; TR at 44-45, 52, 53.

This pragmatic test is no more difficult to apply than many other tests utilized to evaluate whether services are required for disabled children. In fact, if this Court determines that continuous, one-on-one nursing or other trained attendant services which cannot be performed by a school nurse with other responsibilities are inherently burdensome to a district, the test becomes merely a factual finding. Such findings are routinely made by IEP teams.

Schools should not be taken out of traditional roles they have played without a clear legislative mandate. As Congress previously found, schools should not be "asked to do what they are not intended to do." H. Rep. No. 101-544 at 11 (1990). This Court in *Rowley* extensively reviewed the statutory language and legislative history of the Act and concluded that Congress did not intend a broad interpretation that would impose "upon the States a burden of unspecified proportions and weight." 458 U.S. at 190, n. 11. This Court ruled that requirements for local districts to assume large or onerous financial responsibilities under the Act must be spelled out unambiguously:

> "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." [458 U.S. at 204, n. 26, citing *Pennhurst State School v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 1539-40, 67 L. Ed. 2d 694 (1981).]

CONCLUSION

The decision of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,

Petitioner,

vs.

GARRET F., A Minor By His Mother
and Next Friend, CHARLENE F.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

(1) Whether a school district is required to pay for nursing services for a disabled student as a "related service" under the IDEA.

(2) Whether there should be a bright-line rule that the Act's exclusion of "medical services" means only those services provided by a physician.

(3) Whether a school district is required to pay for nursing services under the facts of this case applying a multifactor test.

(4) Whether a school district is required to pay for nursing services under the facts of this case applying Iowa law.

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STATEMENT OF THE CASE

A. Procedural Overview

The Iowa Department of Education (the Department) ruled, on December 16, 1994, that the Cedar Rapids Community School District (the District) was required to reimburse Garret F. for health care costs his parents incurred on his behalf for the 1993-1994 school year. The Department specifically held that the services required were both "related services" under federal law and "supportive services" under Iowa law. Pet. App. 52a, 54a, 63a. Petitioner chose to pursue its appeal in federal rather than state court. The United States District Court for the Northern District of Iowa granted summary judgment in favor of Garret, holding that the services were not within the "medical services" exclusion of the IDEA and therefore were "related services" that the School District was required to provide. Pet. App. 8a-16a. The Court of Appeals for the Eighth Circuit affirmed the District Court. Pet. App. 1a-7a. The District subsequently filed a petition for writ of certiorari, which this Court granted.

B. Garret F.

Garret F. was an energetic, active child when, in 1987, he sustained catastrophic injuries while riding as a passenger on his father's motorcycle. While Garret's mental abilities were unaffected, his spinal cord was severed. Garret, as a result of the accident and at all times relevant, has been quadriplegic, ventilator dependent and uses a wheelchair. His physical impairment has continued to have no effect on his mind or his mental abilities and he is doing well in school. Without the modest care he requires, he would be excluded from public school without any opportunity to obtain a meaningful education. Ruling — Iowa Department of Education. Pet. App. 19a, 59a. Tr. at 87-88. He would be relegated to homebound instruction. *Id*; Tr. at 87-88; 596-97.

C. The Dispute Between Garret F. and the District

In the fall of 1988, Garret F. started kindergarten in the District and has been in school in the District since that date. From

kindergarten through the fourth grade, Garret's family provided a personal attendant. In kindergarten, Garret's aunt, Stephanie Madison, performed the services of personal attendant.[1] From first through fourth grades, from 1989-1993, an LPN performed the services. Tr. at 31, 637-38.

Beginning in the summer of 1988, the year Garret entered kindergarten, his parents asked the District to provide for these services. The Freys were orally advised in 1989 that if they did not provide for the nursing care at school at their expense, Garret would not be permitted to attend the District's schools. Tr. at 637-38, 659-61. No written response was ever made by the District to the request for services until 1993. Tr. at 94. In the Spring of 1993, Garret's mother, Charlene, insisted on an answer in writing and received a denial. Tr. at 94-95.

The District's position throughout has been that, if it assumed responsibility for the care provided, it would be required to use a registered nurse, as opposed to an aide or LPN.[2] Pet. App. 25a; Tr.

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1. Ms. Madison was 18 years old when the school year began and had no RN or LPN certification and no prior nursing experience. Tr. at 82-83. The training received by Stephanie Madison in preparation for the 1988-1989 school year was basically to participate in Garret's care initially and be with family members as they attended to his needs. App. at 13-14; Tr. at 175-76.

2. The Administrative Law Judge (ALJ) commented as follows:

> We have here a situation where it has been determined by the Board of Nursing that an RN must be at the school site to supervise the health care needs of Garret. No mention is made of the current situation with services of an LPN provided by the family with distant RN supervision or the same at home, or not having nursing services during part of the day or on weekends. Why is Garret's situation in school, if the school is responsible, different than when the school is not responsible or Garret is elsewhere?

Pet. App. 61a-62a.

at 15-17, 353-54. In this regard, one of the District nurses testified she would not be comfortable delegating the care to an LPN. Tr. at 453-54.

The District buttressed its position by requesting a declaratory ruling from the Iowa Board of Nursing. Tr. at 351; 433-34. The ruling "based on information provided by the petitioner" was based on a misstatement of the stability level of Garret F.'s health by the District. Exh. 125 at 448; Tr. at 75-76; Pet. App. 31a. One critical error concerned Garret's autonomic hyper-reflexia condition (respiratory distress), which was stable at the time the first opinion was sought from the Board. Tr. at 76; 44-45.

Despite subsequent direct authorization from the Iowa Board of Nursing (via a revised opinion that was sought by the District and received after the Eighth Circuit rendered its opinion) to allow Garret's care to be delegated to an LPN, the District continues to maintain that it would be obligated to provide an RN to provide for Garret's needs. *See* Lodging of Solicitor General.

Because of this refusal, the Frey family has, at its own expense, arranged for an LPN to attend the entire school day with Garret and perform the services he needs. Pet. App. 20a-21a, Tr. at 31. The Freys paid $18.50 per hour for the 1993-1994 school year and $22.00 per hour for 1994/1995 for the nursing services at school. Pet. App. 20a-21a; Tr. at 89-90. The nurse works seven hours per day at school. *Id.*

This situation has existed since Garret's entry into the school system. It has resulted in the exhaustion of medical insurance Garret had through his father's employment; exhaustion of personal funds; and exhaustion of a second health insurance policy. Tr. at 91-92.

D. What Garret F. Needs To Attend School

For the year 1993-1994, as he has had since his kindergarten year, Garret had a set of personal needs that were required to be met while he was at school in order for him to participate in and benefit from the education program. As discussed below, these

needs are primarily met by Garret's family and friends when he is not in school. These needs are:

1. catheterization for urine retention once a day;
2. suctioning of his tracheostomy on an as-needed basis, generally once a day;
3. assistance in positioning his body;
4. ambu-bagging during suctioning;
5. assistance with food and drink;
6. assistance to "troubleshoot" his ventilator;
7. observation of breathing to determine if air is going into the lungs;
8. monitoring for signs of autonomic hyper-reflexia.

Pet. App. 20a.

Garret would be unable to attend school at all without the assistance that his attendant gives him. Tr. at 87-88. If unable to attend, his current educational option would be home-based instruction. Pet. App. 59a. Garret likes school and, with the assistance described above to meet his physical needs, is doing very well. Tr. at 87-88; Exh. 71 (Tr. at 4).

E. None of the Required Services Need to be Performed By a Physician or an RN.

Garret F.'s physician, Dr. Reinertson, testified in the administrative hearing that none of the services that Garret F. needs are required to be performed by a physician. A nurse's aide or LPN is sufficient for all services. App. at 4-10; Tr. at 47-48. He further stated that contrary to the conclusion repeatedly stated by the District on Exh. 91, ("Individualized Healthcare Plan"), Garret did not require continuous monitoring and assessment. App. at 18-19; Tr. at 627-28; Exh. 13-14, 91 (Tr. at 4). Accordingly, the

stated reason for the District's decision that the person providing the services be an RN:

> requires continuous monitoring and assessment, highly technical and extensive nature of care, life threatening prospect of inadequate care, mastery of numerous competencies,

Exh. 91 at 374, was not supported by the medical testimony.

F. When Garret is Not in School, the Services are Provided Primarily by His Parents and Other Non-Health Care Professionals, Including Friends.

The Frey family provides the same services to Garret at night and over the weekends that his LPN provides at school. Tr. at 68. The Frey family has received basic training to perform them. Tr. at 68-69. Mr. and Mrs. Frey received training in suctioning the tracheostomy and catheterization by observation in the hospital. Tr. at 653.

On a normal school day, Garret returns home at 2:45 p.m. From 3:00 p.m. until 11:30 p.m. Garret and his mother are alone with no services being provided by anyone other than Mrs. Frey. Tr. at 654. They have dinner together; they may go to the grocery store together. *Id.* Garret watches television programs, works on his computer, does his homework, and entertains friends. *Id.* They go outside and take a walk. On occasion Garret's mother takes a nap. App. at 19; Tr. at 654. When Garret goes outside he often goes by himself. He will go to the neighbors' house across the street by himself and has even taken a walk in his wheelchair around the block by himself. App. at 20; Tr. at 655. All of these activities are conducted without the assistance of a nurse or other health professional. Tr. 653-55.

During the nighttime hours, from Monday through Friday, a nurse comes to Garret's home to provide services that primarily involve turning Garret in his bed every two hours. Tr. at 672.[3]

Garret visits his father every other weekend and occasionally during the week. Tr. at 640. Garret usually brings a friend with him for the weekend visit. Tr. at 640. During these weekends, Garret's father takes care of the health needs of his son. Tr. at 641.

In addition, Garret's classmates and friends perform several of the services at issue including suctioning, ambu-bagging (provision of a manual breath by squeezing an air bag attached to the tracheotomy tube), assistance with feeding and drinking, shutting off alarms on the ventilator, helping him use his wheelchair and assisting with the ventilator. App. at 10-11; Tr. at 84-85.

G. The Potential Cost to the District Has Been Exaggerated.

The District receives additional funding because of Garret's special education status. According to the District, Garret's "rating" of "3.6 FTE" generates an additional $8,500-$9,000 for the District. Tr. at 491-93; 513-514; Exh. 48 (Tr. at 4); Pet. App. 36a. The District also receives approximately $3,600 in normal or regular funding because of Garret's attendance, for a total revenue to the District of $12,700. Pet. App. 36a; Tr. at 514. The total funding received by the District for the 17,500 students (before extra money for special education) is $63,000,000 (17,500 x $3,600) for 1993-1994. Tr. at 513-14. *See also* Brief for Amicus Curiae, National School Board Association, at 18, 26 (18,000 students x $5,483 = total funding of $98,940,000).

The District does provide a teacher associate to assist with turning pages in books and organizing his desk. Tr. at 278-79;

3. The nursing services are provided by an LPN at home rather than a non-licensed person due to the requirements of the health insurance policy in effect at the time of trial, which required a licensed agency for reimbursement. App. at 12-13; Tr. at 168. In contrast, the health insurance policy in effect in 1988 did pay for services given by Stephanie Madison at home, even though she was not a licensed provider.

522. The teacher associate's compensation is $9,548. Tr. at 523. A "first-year" RN could be hired for $27,981.79. Pet. App. 27a; Exh. 136; Tr. at 523-25. The District stipulated that if an RN were hired, the teacher associate would not be necessary, since the RN can also do all the things the associate does. Tr. at 278-79, 424-26, 465. Tr. at 465. Thus, the "net" cost of an RN would be approximately $18,000 for a first year RN, more for a more experienced RN. Pet. App. 28a.

There are 2,200 special education students in the District. Tr. at 533. Each of those students receives additional funding which, when received, is put into a category within the District budget and then sub-grouped with other categories. Tr. at 533-34. The District does not limit the expenditure for any specific student to the extra special education funding the District receives for that student. Tr. at 539-40. There is no spending limit legally imposed upon a School District with regard to an individual student with disabilities. Tr. at 604.

The funding issue was not, according the District, a primary reason for the denial. Tr. at 567. The "only reason" for the District's refusal to pay for related services and health services is the District's interpretation of legal requirements. Tr. at 524.

When the special education budget is "over-spent," the District incurs what it refers to as a "deficit." Tr. at 588. Even in these instances, the special education budgetary obligations are met by the District. Tr. at 590. During the five years preceding trial, all special education budgetary overrides were met. Tr. at 590. As the ALJ found, the District can obtain funds from the District cash reserve or receive additional funds from the State of Iowa. Pet. App. 37a; Tr. at 588. Significantly, as the ALJ found, the District has identified and weighted Garret for funding under state law. Pet. App. at 58a.

H. The District Provides Most of the Needed Services to Other Children.

The District provides the following services to other children at its cost: (1) intermittent catherization (done primarily by teachers

or teacher assistants), Tr. at 286, 335; (2) assistance in consuming food and drinking water and other beverages (often by nonlicensed personnel), Tr. at 290, 382; (3) monitoring of blood sugar levels for diabetic students (which Garret does not need), Tr. at 455-57; (4) suctioning of tracheostomies, Tr. at 332-34; (5) tube feeding (which Garret does not require), Tr. at 336; and (6) positioning services. Tr. at 556.

I. The Department's Decision was Based on State as Well As Federal Law

An administrative hearing was held by the Iowa Department of Education. The Department ruled that under *both* state and federal law, the District was obligated to reimburse Garret's mother for his health care costs for the 1993-1994 school year and to continue to provide "school health care for Garret as a related service." Pet. App. 58a, 63a.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eighth Circuit correctly held that Garret F. was entitled to nursing services as related services under the IDEA. The Court of Appeals' ruling was correct under the plain language of IDEA, the relevant regulations, and the Act's legislative history, all as interpreted by this Court in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984) and other cases. Despite the District's assertions to the contrary, the IDEA is not merely "about education." It is about *access* to education. It specifically provides that: "all children with disabilities have available . . . a free appropriate public education . . . and related services designed to meet their unique needs . . ." 20 U.S.C. § 1400(c) (1994). Without meaningful access, including the provision of a broad range of supportive services, the goal of a "free and adequate public education" would be a hollow promise. *See Tatro*, 468 U.S. at 891.

The importance of meaningful access is illustrated by the facts of this case. The services are simple, straight-forward acts that can be provided by a nurse's aide or an LPN, and, in fact, have been

provided by Garret's friends, family, and a number of nonlicensed providers. The services are not required to be performed by a physician. The services can be provided at no additional cost to the District by the existing educational aide, who is an LPN and could provide the services. Without this care, however, Garret is condemned to miss out on school and would be kept at home in a segregated, home-based program.

This Court's decision in *Tatro*, 468 U.S. 883 (1984), supports a "bright-line" rule for cases such as this one. The bright line is drawn between services that must be performed by physicians (except those performed for the purpose of diagnosis or evaluation) and those provided by other providers, including school nursing services. The bright-line test would afford recipients of funds under the IDEA clear notice of their obligation. *See Tatro*, 468 U.S. at 891.

The bright-line test is also consistent with the clear language of the statute and the regulations of the Department of Education. The Court of Appeals properly deferred to the Secretary of Education regulations, which interpret IDEA to include as "related services" the health services provided by a school nurse or other qualified nonphysician, but to exclude as "medical services" those services that must be provided by a physician, other than for diagnosis and evaluation. Deference to the federal agency's interpretation is proper. *Chevron U.S.A., Inc. v. Natural Resources Council, Inc.*, 467 U.S. 837 (1984).

As noted by this Court in *Tatro*, it could be inferred that the expense issue was taken into account by Congress in excluding "medical services" provided by physicians. 468 U.S. at 892. The line having been drawn, expense should not be a determining factor as to whether nursing services are excluded, since this will lead to protracted litigation in many cases. It should also be noted that the expense in this case has been exaggerated: the services can and have been provided by an aide or an LPN, not an RN, at no additional cost to the District and can be and have been provided by non-professionals, including family members and friends.

While "undue burden" with regard to cost is not a factor under the IDEA, even if it were taken into consideration, the District's cost

arguments fail on the record in this case. The additional cost is nil if an LPN is used. The cost is minimal if an RN is used compared to the resources of the District. The District also has funding options available to it to obtain additional funds if it chooses, including funding from the State of Iowa. Further, the record is devoid of any evidence that the services required are outside the competence of the District's school nursing personnel. These are rudimentary services, most of which the District already provides to other children.

The District's proposed multifactor analysis is unworkable and, if adopted, would result in costly administration and litigation in future cases. However, even if this Court were to adopt a multifactor test in this case, Garret would be entitled to reimbursement for the requested nursing services due to the facts of this case.

Finally, the judgment should be affirmed because the services are required to be provided under state law.

In summary, the Eighth Circuit properly held that the services are required related services. Further, deference to rulings of state educational authorities, such as that of the Iowa Department of Education, is an essential part of implementation of the IDEA. *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 204-07 (1982). The obligation of the District exists under both federal and state law. For these reasons the judgment should be affirmed based on application of the bright-line test, or application of a multifactor test, or on state law grounds.

ARGUMENT

I.

THE IDEA REQUIRES THE DISTRICT TO PROVIDE THE REQUESTED NURSING SERVICES TO GARRET F.

Congress' purpose in enacting the Individuals with Disabilities Education Act (IDEA) (and its predecessor the Education of the Handicapped Act) was to "make public education available to handicapped children" *and* "to make such access meaningful." *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982). The Act is therefore not merely "about education" as the District asserts (Petitioner's Brief at 12) but about providing access, which often includes the provision of needed health-related services. As this Court elaborated in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), consistent with the goal of access to a "free and appropriate public education," the Act requires a two-part analysis: first whether a requested service is a "supportive service . . . required to assist a handicapped child to benefit from special education;" and second whether the service is excluded from the definition as a "medical service" (other than those required for diagnosis and evaluation). *Id.* at 886.

Despite the District's attempts to paint the services needed by Garret as "intensive, one-on-one full-time nursing care that Garret needs to stay alive" (Petitioner's Brief at 13), the record is overwhelmingly to the contrary. Tr. at 43-53. All of the services required by Garret can be performed by a nursing assistant or aide or a licensed practical nurse. *Id.*; Exhs. 26, 78 (Tr. at 4). Neither a registered nurse nor a physician is required. Indeed, the care the District persists in labeling "intensive, one-on-one full-time nursing care" is provided by a family member or friends when Garret is not at school. App. at 10-11; 19-20; Tr. at 32-34; 84-85; 641-41; 654-55. Without these services, Garret would not have "meaningful access" to an education. Tr. 87-88. He would be consigned to homebound instruction and be deprived of the stimulation provided by a classroom. Pet. App. 59a; Tr. at 87-88.

The language of the IDEA, the related regulations, the Act's legislative history and this Court's prior decisions interpreting the IDEA all support the determination by the ALJ that the nursing services required by Garret are "related services" that the District is required to provide at its cost in order to afford Garret meaningful access to a free appropriate public education.

A. The Language of the Statute and Regulations as Interpreted by the Secretary of Education Supports a Bright-line Test and Provision of the Requested Services in This Case.

Neither the plain language of the statute nor its purpose, 20 U.S.C. § 1400(c), supports the District's argument that Garret's needs are "medical services." Nowhere in the statutory language are the services required by Garret F. defined as excluded "medical services." On the contrary, the use of the broadly inclusive term "supportive services" in the enumeration of "related services" supports Garret F.'s position that these services must be provided.

The IDEA provides for a "free appropriate public education," which emphasizes special education and related services designed to meet a disabled student's unique needs. 20 U.S.C. § 1400(c). Such an education is defined as "special education and related services," which have been provided at public expense, under public supervision and direction, and without charge, and which are provided in conformity with the individualized education program required under the statute. 20 U.S.C. § 1401(a)(18).

The key statutory provision in this case is 20 U.S.C. § 1401(a)(17):

> The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling services, and medical services, except that such medical services shall be for

> diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

The implementation of the IDEA is provided for in 20 U.S.C. § 1402(a), as amended. This section provides for the Office of Special Education Programs "which shall be the principal agency in the Department for administering and carrying out this Act [20 U.S.C. §§ 1400 *et seq.*] and other programs and activities concerning the education and training of the handicapped." 20 U.S.C. § 1402(a) (1991).

Under the regulations promulgated by the Department of Education, a "related service" is defined as any service "required to assist a child with a disability to benefit from special education." 34 C.F.R. § 300.16. A related service expressly includes "school health services." *Id.* "School health services" means "services provided by a qualified school nurse or other qualified person." 34 C.F.R. § 300.16(b)(11).

Medical services are expressly included as a related service but are limited in definition to "services provided by a licensed physician to determine a child's medically related disability." 34 C.F.R. § 300.16(b)(4). Related services, therefore, include a physician's diagnostic and evaluation services, but not treatment services. 20 U.S.C. § 1401(a)(17).

Under the Department of Education regulations, medical services are defined as "services provided by a licensed physician." 34 C.F.R. § 300.16(b)(4). The services Garret F. requires are not "medical services" and must be provided by the District as "related services."[4]

4. In the alternative, these services also appear to be "supplementary aids and services" necessary to "assure that, to the maximum extent appropriate, children with disabilities . . . are educated with children who (Cont'd)

B. This Court's Approach In *Tatro* Supports a Bright-line Test; The Test is Also Consistent With the Court's Decision in *Rowley*.

This Court first addressed the issue of whether nursing services fall within the scope of covered "related services" under the IDEA and the Department of Education regulations in *Tatro*, 468 U.S. 883 (1984). *Tatro* involved the issue of whether clean intermittent catheterization (CIC), a procedure involving the insertion of a catheter into the urethra to drain the bladder, was a related service under the IDEA. 468 U.S. at 885.

In *Tatro* this Court stated

> the regulations actually define only those "medical services" that are owed to handicapped children: services provided by a licensed physician to determine a child's medically related handicapping condition . . . *presumably this means that "medical services" not owed under the statute are those 'services by a licensed physician' that serve other purposes.*

468 U.S. at 892 n.10 (emphasis added). The Court found that:

> this definition of "medical services" is a reasonable interpretation of congressional intent. Although Congress devoted little discussion to the "medical services" exclusion, the Secretary could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that might

(Cont'd)
with children who are not disabled," 20 U.S.C. § 1412(5)(B). This Court noted the availability of this alternative in *Tatro*, 468 U.S. at 895 n.13. Congress defined the phrase "supplementary aids and services" in the 1997 IDEA Amendments (it was previously not defined in the statute or regulations) to mean "aids, services, and other supports that are provided in regular education classes . . . to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate." Pub. L. No. 105-17, Title I, § 101, 111 Stat. 37 (1997) (to be codified at 20 U.S.C. § 1401(29)).

> well prove unduly expensive and beyond the range of their competence.[5] From this understanding of congressional purpose, the Secretary could reasonably have concluded that Congress intended to impose the obligation to provide school nursing services.

468 U.S. at 892-93.

The Court further stated that Congress plainly required schools to hire various specially trained personnel to help handicapped children and that school nurses have long been a part of the educational system. The Court determined that the "Secretary could therefore reasonably conclude that school nursing services are not the sort of burden that Congress intended to exclude as a 'medical service.' " The Court reasoned that "[b]y limiting the 'medical services' exclusion to the services of a physician or a hospital, both far more expensive, the Secretary has given a permissible construction to the provision." 468 U.S. at 893-94. Deference to the agency interpretation is proper. *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984).

The Court then noted several limitations that "should minimize the burden [of costs] the Petitioner fears":

> First, to be entitled to related services, a child must be handicapped so as to require special education . . . Second, only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless how easily a school nurse or a lay person could furnish them . . .Third,

5. The Petitioner omits any discussions of the second half of this language, i.e., "and beyond the range of their competence." There is no dispute in this record that the services are within the range of the competence of the providers the District has traditionally employed. In fact, with limited exceptions related to the ventilator and autonomic hyperflexia, the District has provided all of the services to other children within the District. *See, supra* Section H — Statement of the Case. The District's Amicus also lists school nurse services at pages 19-21 of its brief which include several of the services needed here.

> the regulations state that school nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician.

468 U.S. at 894.

The Court in *Tatro* did *not* conclude that cost was a factor to be considered.[6] It merely observed that Congress and the Department of Education may have used expense, as well as limitations of educators' expertise in medical matters, for making a distinction between nursing services and physician treatment in determining what constitutes a related service. 468 U.S. at 892-93.

Tatro recognized an important principle. A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned: "The Act makes specific provision for services, like transportation, for example, that do no more than enable a child to be physically present in class. . ." 468 U.S. at 891. *Tatro* affirms the principle that health services do the same and must therefore be provided. *Id.*

The result urged here is also consistent with the Court's decision in *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) which first addressed the predecessor statute to the IDEA. As a threshold matter, *Rowley*'s extended discussion and analysis of the Act's legislative history, discussed *infra* at I(C), demonstrate that the intent of Congress was to make available the services needed by children such as Garret F. unless performed by a physician. Further, *Rowley*, in contrast to this case, did not address the issue of access to a free appropriate public education. In *Rowley*, there were findings that the student was receiving an "adequate education," including personalized

6. Indeed, the IDEA does not contain an "undue burden" defense, as does the Americans With Disabilities Act. 42 U.S.C. § 12112(b)(5)(A).

education. 458 U.S. at 210. It was therefore uncontested that the student, who was deaf, had access to a free public education, *i.e.*, that the District was providing sufficient services at its cost to provide access to a free appropriate education under the Act. The dispute centered around whether the District was required to assume the cost of a sign language interpreter. 458 U.S. at 184-85. The issue in *Rowley* was therefore the level of services that the District was obligated to provide at its cost. 458 US. at 200. The facts of this case are starkly different; it is uncontested that without the requested nursing services, Garret F. would not be able to attend school and would be consigned to homebound instruction.

The services Garret F. needs are accordingly "related services" not "medical services," and the District is required to provide for them. The Eighth Circuit properly followed this Court's prior decisions, including *Tatro*, which correctly interpreted the IDEA and the regulations of the Secretary of Education.

C. The Legislative History of the IDEA Supports the Provision of the Requested Health Services to Garret F.

The legislative history of the IDEA also supports the provision of nursing services at the District's cost. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), this Court first addressed the IDEA and the history of educating children with disabilities:

> Dissatisfied with the progress being made under [the Elementary and Secondary Education Act of 1965 and the Education of the Handicapped Act (L. 91-230)] and spurred by two District court decisions holding that handicapped children should be given access to public education, Congress in 1974 greatly increased federal funding for education of the handicapped and for the first time required recipient states to adopt "a goal of providing full educational opportunities to all handicapped children." Pub. L. 93-380, 88 Stat. 579, 583 (1974 Statute). The 1974 statute was recognized as an interim measure only, adopted "in

> order to give the Congress an additional year in which to study what if any additional federal assistance [was] required to enable the States to meet the needs of handicapped children." HR Rep, at 4. The ensuing year of study produced the Education for All Handicapped Children Act of 1975.

458 U.S. at 179-80 (citations omitted).

The Court noted that portions of the statute reflected on congressional intent:

> Congress found that of the roughly eight million handicapped children in the United States at the time of the enactment, one million were "excluded entirely from the public school system" and more than half were receiving an inappropriate education.

458 U.S. at 189. Prior to the Act "many of these children were excluded completely from any form of public education or were left to fend for themselves in classrooms designed for education of their nonhandicapped peers." *Id.* The Court noted the

> House Report begins by emphasizing this exclusion and misplacement, noting that millions of handicapped children were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to "drop out".

Id.

One of the Act's two principal sponsors in the Senate urged its passage in similar terms:

> While much progress has been made in the last few years, we can take no solace in that progress until all handicapped children are, in fact receiving an education. *The most recent statistics provided by the Bureau of Education for the Handicapped estimate that . . . 1.75 million handicapped children did not*

> *receive any educational services, and 2.5 million handicapped children are not receiving an appropriate education.*
>
> * * *
>
> Congress sought "to provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws."

458 U.S. at 191, 198 (emphasis added).

Petitioner and its Amicus, National School Boards Association, make much of the argument that spending for special education has increased since the late 60s. This argument misses the point, which is that children with disabilities are finally getting the educational opportunity of which they have been so deserving for so many years. *See e.g.* S. Rep. 91-634 at 146. The argument also ignores the financial support Congress does supply, 20 U.S.C. § 1411; 34 C.F.R. § 300.184 (1996), which is available to the District under State law.

In 1991, the IDEA was renamed and amended. The legislative history indicates that a principal purpose of the 1991 IDEA was to strengthen and coordinate pre-existing federal programs and requirements for children and youth with disabilities. H.R. Rep. No. 102-198 at 1-2 (1991). Significantly, in 1991, seven years after this Court's decision in *Tatro*, Congress could have remedied the effect of the distinction made in *Tatro* between excluded medical services (those provided by a physician) and included services (those provided by other providers). It did not do so.

While Congress in the past has chosen to overrule legislatively a decision of the Court interpreting the IDEA, *Smith v. Robinson*, 468 U.S. 992 (1984)[7], it did not so act when it reauthorized the

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7. *See Mrs. W. v. Tirozzi*, 832 F.2d 748, 754-55 (2nd Cir. 1987); H.R. Rep. No. 296, 99th Cong. 1st Sess. 4-6 (1985).

IDEA in 1997. *See* 20 U.S.C. § 1412(5)(A) (1997); *see also*, Report of the Committee on Education and the Workforce House of Representatives, May 13, 1997, p. 91.

In light of the legislative history of the IDEA, there can be no doubt that the services Garret needs must be provided by the District, and the decisions of the Iowa Department of Education, the District Court and the United States Court of Appeals for the Eighth Circuit should be affirmed. *See S-1 v. Turlington*, 635 F.2d 342, 347 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (The IDEA must "be broadly applied and liberally construed in favor of providing a free and appropriate education to handicapped students").

The District's legislative history arguments are not well-founded. First, Petitioner's selective quotation of the recent amendments to the IDEA, Pub. Law 105-17, is significant. Petitioner, in its efforts to argue that the IDEA is limited to educational services, omitted the following congressional findings related to disability. These findings underscore the importance to Congress of *access* to education:

> (c) Findings — The Congress Finds the Following:
>
> (1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.
>
> * * *
>
> 5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by —

> (a) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible;
>
> * * *
>
> (c) coordinating this Act with other local, educational service agency, State, and Federal school improvement efforts in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where they are sent;
>
> (d) providing appropriate special education and related services and aids and supports in the regular classroom to such children whenever appropriate[.]

Second, the District further argues that because Congress did not narrow or "clarify" the "medical services" exclusion in 1990, this confirms that Congress did not want the Act to become more than an education law. Petitioner's Brief at 18. The District claims that Congress should have responded to the *Detsel* and *Bevin H.* decisions and clarified the law. However, the fact that it did not do this could, and more logically should, be interpreted to mean that Congress was satisfied with this Court's ruling in *Tatro*, which gave deference to the Agency's regulations. This applies with equal force to the District's argument that the definition of medical services should have been clarified in June of 1997. Petitioner's Brief at 19.

Further, Congress' actions in response to early proposed regulations confirm that the Secretary's "related services" regulation is consistent with the statute. On August 4, 1982, the Secretary of Education issued proposed regulations that would have changed various aspects of the special education regulations and, specifically, would have narrowed the class of services that must be provided under IDEA. The proposal would have eliminated "school health services" from the definition of "related services;" it would have

expanded the "medical services" exclusion (which the Secretary noted meant "services provided by a licensed physician," 47 Fed. Reg. 33,838) to mean "services relating to the practice of medicine"; and it would have allowed school districts to place "reasonable limitations" on provision of related services, including limitations based on the level, frequency, location, and duration of the services, and the qualifications of the service providers. *See id.* at 33,838-33,839; 33,846.

The proposed regulations provoked public and Congressional opposition. Congressional criticism specifically targeted a few of the proposed amendments, one of which was the amendment to the "related services" regulation. *See* 128 Cong. Rec. 21,793 (1982) (Statement of Rep. Bonker) (condemning proposed "changes that would permit limitations in necessary health services for handicapped children"). On September 10, 1982, Congress enacted § 305(b) of Pub. L. No. 97-257, 96 Stat. 874, expressing the sense of Congress that the proposed regulations should not become effective and should not be transmitted to Congress while it was not in session. *See also* H.R. Res. 558, 97th Cong., 2d Sess. 2-3 (reported out of House Committee on Education and Labor on September 30, 1982). On November 3, 1982, the Secretary withdrew six of the most controversial changes, one of those being the proposal to narrow the "related services" regulation. *See* 47 Fed. Reg. 49,871-49,872; *see also* 128 Cong. Rec. 27,508 (1982).

The following year, Congress enacted Section 608 of the Education of the Handicapped Act Amendments of 1983, which states that the Secretary

> may not implement . . . any regulation prescribed pursuant to this Act which would procedurally or substantively lessen the protections provided to children with disabilities under this Act, as embodied in regulations in effect on July 20, 1983 (*particularly as such protections relate to . . . related services . . .*), except to the extent that such regulations reflect the clear and unequivocal intent of the Congress in legislation.

Pub. L. No. 98-199, Title VI, § 608(b), 97 Stat. 1359, (codified as 20 U.S.C. § 1407(b)) (emphasis added). That provision was enacted in direct response to the changes proposed and then withdrawn by the Secretary in 1982. *See* 129 Cong. Rec. 33,316 (1983) (Statement of Rep. Biaggi). Under the circumstances, Section 1407(b) can only be seen as congressional confirmation that the current "related services" regulation reasonably interprets congressional intent, as well as a rejection of a multifactor determination of "related services" that would take into account the extent or nature of the services in each case.

> Where, as here, "Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation," we cannot but deem that construction virtually conclusive.

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986). The record of Congress' actions clearly refutes the District's legislative history argument.

D. Petitioner's Statutory Construction Arguments Must Fail Because They Are Contrary to the Intent of Congress.

Under well-established principles of statutory construction, while the "starting point in every case involving construction of a statute is the language itself," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976), all provisions of a statute must be harmonized and must be read so as to be consistent with other expressions of legislative intent. *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). In construing a statute the Court will not be "guided by a single sentence or member of a sentence, but [instead] look[s] to the provisions of the whole law, and to object and policy." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986) (citations omitted). Consistent with these principles, the District's statutory construction arguments must fail.

The analysis at pages 14 and 15 of Petitioner's Brief concerning the meaning of the term "medical services" of Petitioner's Brief simply misses the point. Petitioner quickly moves from the statutory language of the IDEA and focuses not on "medical services" as defined in the statute and regulations but instead couples the word "medical" with a variety of other words such as "care," "assistance," "devices," "benefits," and "providers." However, a careful analysis of the United States Code reflects that the term "medical services" generally if not universally means services provided by a physician. For example, in 5 U.S.C. § 8103(a)(3) employees are given the right to "initially select a physician to provide medical services, appliances, and supplies . . ." In 10 U.S.C. § 1588(a)(1) the Secretary is authorized to accept "voluntary medical services, dental services, nursing services, or other health-care related services." In 12 U.S.C. § 1715(w)(a)(1) the terms "skilled nursing care" are used in the same sentence as "and related medical services." 26 U.S.C.A. § 9712(c)(3)(F) provides for "selecting the most efficient physicians and state-of-the-art utilization management techniques, including ambulatory care techniques, for medical services delivered by the managed care network."

In 38 U.S.C. § 101(28)

> the term "nursing home care" means the accommodation of convalescences or other persons who are not acutely ill and not in need of hospital care, but who require nursing care and related medical services, if such nursing care and medical services are prescribed by, or performed under the general direction of, persons duly licensed to provide such care.

42 U.S.C. § 280(a)(1) provides

> to identify low-income individuals who can avoid institutionalization or prolonged hospitalization if skilled medical services, skilled nursing care services, homemaker or home health aide services or personal care services are provided in the homes of the individuals.

In 42 U.S.C.A. § 1397cc(c)(1)(B) categories of basic services described includes "Physicians' surgical and medical services." Thus, the primary, if not universal, definition of "medical services" found in the United States Code is consistent with the Department of Education's definition of medical services as those required to be provided by a physician in 34 C.F.R. § 300.16(b)(4).

The Petitioner's argument, at page 17 of its Brief, concerning "other agencies" is an argument that really has no bearing on this case. Garret has been providing for his services with his own money and insurance. Medicaid may be an available resource to him at some point. *See Detsel v. Sullivan*, 895 F.2d 58, 65-66 (2nd Cir. 1990). Funding from the State of Iowa is also available to the District. The fact that other sources of funding may be available does not mean schools can avoid their obligation to provide related services. Senator Grassley explained that these provisions requiring interagency agreements clarified "that schools are not the only agencies that should pay for the services special education students need." 143 Cong. Rec. § 4407 (daily ed. May 14, 1997); *see also* 143 Cong. Rec. § 4373 (daily ed. May 13, 1997) (Statement of Sen. Murray) ("This bill holds outside agencies responsible for their share of the health or other costs of serving disabled students, so we can clarify that local schools do not bear all the responsibility for these costs."); *id.* at 4300 (Statement of Sen. Harkin) ("[I]n States that have voluntarily provided interagency supports cost savings to [local education agencies] have been significant."); *Hearings on H.R. 5, The IDEA Improvement Act of 1997: Before the House Subcomm. on Early Childhood, Youth & Families of the Comm. on Economic & Educ. Opps.*, 105th Cong., 1st Sess. 46 (1997) (colloquy between Rep. Miller and Assistant Secretary of the Department of Education Heumann as to the need for coordination of payment for health services).

Accordingly, application of statutory construction principles supports the construction in this case of the term "medical services" to mean those performed by a physician.

E. The Lower Court Cases on Which the District Relies Have Erroneously Interpreted this Court's Decision In *Tatro*.

The lower court cases on which the District relies have simply have read requirements into the law that *Tatro* did not impose.

Detsel v. Bd. of Educ. of Auburn, 637 F. Supp. 1022, 1027 (N.D. N.Y. 1986), *aff'd*, 820 F.2d 587 (2nd Cir.) (per curiam), *cert. denied*, 484 U.S. 981 (1987), concluded that while the disputed services did not actually meet the statutory and regulatory definition of "medical services," because the regulation specifically addresses physician-performed services, the denial of the services "is in keeping with [the regulation's] spirit." The problem with this finding is that it ignores the spirit of the IDEA itself. As this Court in *Tatro* stressed, the reason for mandating the provision of supportive services under the IDEA is to guarantee disabled students an opportunity to gain an education. If granting such an opportunity entails furnishing medically-related services short of requiring a physician, such services are the student's right. The IDEA, its legislative history, and its regulations are void of any suggestion that states are free to decide, on the basis of the cost and effort required, which related services fall within the medical services exclusion. *See generally*, *Macomb County Sch. Dist. v. Joshua S.*, 715 F. Supp. 824 (E.D. Mich. 1989) (following *Tatro* and criticizing *Detsel* and its progeny).

Bevin H. v. Wright, 666 F. Supp. 71, 75 (W.D. Pa. 1987), reached its result by holding that related services are only those that are "within reason" and that the proper determination involves a balancing of factors. Yet, *Bevin H's* reliance on *Dept. of Educ., State of Hawaii v. Katherine D.*, 727 F.2d 808 (9th Cir. 1984) (holding that tracheotomy care is a related service), for this proposition is misplaced. In holding that a school district need only provide services within reason, the Court in *Katherine D.* was responding to the question of whether the IDEA must provide a handicapped student "the best possible education." 727 F.2d at 813. This inquiry is entirely separate from the inquiry concerning

the services necessary to provide a child "with meaningful access to education . . ." *Tatro*, 468 U.S. at 891. The issue of the level of education required under the IDEA may raise questions of balance. Yet, once a District determines the appropriate education, the issue of access must be examined within the framework supplied in *Tatro*.

In *Neely v. Rutherford Co. Schools*, 68 F.3d 965 (6th Cir. 1995), the Court of Appeals found it appropriate to take into account the risk involved and the liability factor of the school district. *Id.* at 971. In the case at bar, the District has functionally disavowed any liability concerns by providing these services to other children in the District. At trial it specifically disclaimed any concern that it might be sued as a result of employing a nonlicensed provider. Tr. at 584-85. Further, in *Tatro*, the Court held that the liability risks to school personnel providing the needed service had "no relation to" whether the service was a related service under the IDEA. 468 U.S. at 984 n.12 ("Congress assumed that states receiving the generous grants under the Act were up to the job of managing these new risks"). *Neely* gave no reason for failing to accord any deference to the Secretary of Education's interpretation or failing to follow *Tatro* on the "risk" issue.

Clovis Unified School District v. California Office of Administrative Hearings, 903 F.2d 635 (9th Cir. 1990) (per curiam), likewise gave no reason for failing to apply the Secretary's "related services" regulation and did not acknowledge the *Tatro* Court's reliance on the regulation. *Clovis* involved a psychiatric hospitalization for an emotionally disturbed child. *Id.* at 639. The dispute centered on whether the District was responsible for an admission to an acute psychiatric hospital, at the cost of $150,000 per year, or whether placement in a residential school at the cost of $50,000 was appropriate. *Id.* The District contended that the IDEA did not require it to pay the costs of a psychiatric hospitalization because it was in response to a medical problem rather than an educational need and was thus not the type of residential program contemplated under the IDEA. *Id.* at 642. The Court drew an

analogy between psychiatric hospitalization and two "medical" situations under the IDEA:

> (1) if a child requires, for example, ear surgery to improve his hearing, he may learn better after a successful operation and therefore in some respects his surgery is "supportive" of his education, but the school district is certainly not responsible for his treatment. Similarly (2) a child who must be maintained on kidney dialysis certainly cannot benefit from education to the extent that such services are necessary to keep him alive, but again, it is not the responsibility of the school district to provide such maintenance care.

903 F.2d at 643-44. The Court in *Clovis*, in denying the services, noted that "by law, a licensed physician, though not necessarily the primary treating physician was required to supervise Michelle's overall treatment program." However, the Court in *Tatro* had expressly rejected the District's argument that services provided in accordance with a physician's prescription and general supervision fell within the medical treatment exclusion. It noted that nurses in the school were authorized to dispense medications and administer emergency injections to nondisabled students in accordance with a physician's prescription. 468 U.S. at 893.

Further, the *Clovis* Court noted "that the intensity of [the student's] program indicates that the services she received were focused upon treating an underlying medical crisis." It noted that the less expensive residential placement includes educational services, but the more expensive psychiatric hospital "does not provide its patients with educational services" and thus differed substantially from facilities found by other circuits to be residential placements for which school districts are financially responsible. *Id.* at 646. "The absence of educational services provided by [the psychiatric hospital] indicates that the room and board were medically as opposed to educationally related." *Id.* at 647. The facts of *Clovis* cast substantial doubt on whether the Ninth Circuit would rule the services Garret needs are not required "related services" under the IDEA.

Fulginiti v. Roxbury Township Public Schools, 921 F. Supp. 1302 (D. N.J.), *aff'd without published opinion*, 116 F.3d 468 (3rd Cir. 1997), specifically adopted the ruling from *Detsel* and analyzed the "nature of the services" required and cost of providing the services. *Id.* at 1325. The Court found that the $56,000 annual cost amounted to an "undue burden" and found that the parents had not offered any proof of a lesser priced alternative. *Id.*

In contrast to the cases relied on by the District, a number of courts have followed *Tatro*. In *Tanya v. Cincinnati Board of Education*, 651 N.E. 2d 1373, 1376 (Ohio Ct. App. 1995), the Ohio Court of Appeals required the services of an attendant to monitor and suction a tracheotomy tube every 20-40 minutes under the IDEA. Tracheotomy care has also been held to be a related service. *Dept. of Education v. Katherine D.*, 727 F.2d 809, 815 (9th Cir. 1983). *See also Special School District No. 6, St. Paul, MN*, 23 IDELR 119, 131 (1994) (noting that both "parties assume that tracheal suctioning must be provided by the District"). Catheterization was found to be a related service in *Tokarcik v. Forest Hill School District*, 665 F.2d 443 (3rd Cir. 1981), *cert denied*, 73 L. Ed. 2d 1383 (1983).

In *Morton Community School District No. 709 v. JM*, 986 F. Supp. 1112 (C.D. Ill. 1997), the Court held that under either *Detsel* and its progeny or the *Tatro* bright-line rule that a "pediatric nurse" or "trained" individual to monitor the student during the day was required under the IDEA as a related service. This case was affirmed by the U.S. Court of Appeals for the Seventh Circuit on July 27, 1998, although the Court declined to adopt either a bright-line or a multifactor test. *Morton Community Sch. Dist. No. 709 v. J.M.*, 1998 WL 420393 (7th Cir. 1998). *Morton* involved a fourteen year-old student who breathed through a tracheotomy tube with the intermittent aide of a portable ventilator system. *Id.* at *1. The Court discussed the Department of Education related services regulations and found "the interpretations that the Department of Education places on its own regulations are entitled, of course, to some measure of judicial deference," even when

expressed informally, in a letter or a brief. *Id.* at *3 (citations omitted).

The Court of Appeals rejected the school district's argument, similar to the argument made by the District in this case "that the only health-related services that are not medical services within the meaning of the Act are services traditionally provided by the school nurse." *Id.* at *3. The Court of Appeals found that

> the fallacy in the school district's reliance on the regulation and the *Tatro* decision is the assumption that because services provided by the school nurse are not deemed medical for purposes of the statute, any service that the school nurse can't provide must be deemed medical.

The Court of Appeals also found it significant that the parents could and did provide the services. *Id.* at *3.

Accordingly, contrary to the District's assertion, the Eighth Circuit's decision in this case is in keeping with several other lower courts' decision interpreting *Tatro*.

F. The District's Cost Argument Under the Spending Clause Fails Because the IDEA Establishes Enforceable Rights so as to Put Recipients of Federal Funds on Notice of Their Obligations.

The District, in Section I(D) of its Brief, argues that

> [i]f Congress had intended that School Districts were to provide for costly private nursing services . . . it would have specifically stated so in its definition of "related services."

Petitioner's Brief at p. 20, relying on the Court's spending clause analysis in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) and subsequent cases. In *Pennhurst*, the Supreme Court held that the "Bill of Rights" provision of the

Developmentally Disabled Assistance and Bill of Rights Act did not create any substantive rights to "appropriate treatment" in the "least restrictive" environment in favor of mentally retarded individuals. 451 U.S. at 18. The Court in *Pennhurst* held that because statutes enacted under the Spending Clause of the United States Constitution are "much in the nature of a contract," an express condition that creates enforceable obligations must be "unambiguously" stated so as to give recipients of grant money fair notice of the condition. 451 U.S. at 17-18. The Court found that the language of the "Bill of Rights" provisions of the Act was merely "hortatory," 451 U.S. at 24, and accordingly did not put the fund recipients on notice that they would be obligated to "spend state money to fund certain rights as a condition of receiving federal money under the Act. . . ." 451 U.S. at 18.

This is not a case like *Pennhurst*, in which the statutory provision involved was one in which Congress was merely giving a "nudge in the preferred direction" through precatory language. *Pennhurst*, 451 U.S. at 19 (citing with approval *Rosado v. Wyman*, 497 U.S. 397, 413 (1970)). This case is different for two reasons. First, the obligation to provide nursing services is imposed independently under Iowa law; thus this is not a case in which the federal government has compelled the state to make expenditures. Second, in contrast to the statute interpreted in *Pennhurst*, the IDEA establishes enforceable rights. *Honig v. Doe*, 484 U.S. 305, 309-10 (1988).[8] The Court in

8. Furthermore, it can be inferred that Congress enacted IDEA pursuant to its Fourteenth Amendment enforcement powers as well as pursuant to the Spending Clause. The Court in *Smith v. Robinson*, 468 U.S. 992 (1984) held that IDEA precludes claims based on the Equal Protection Clause because Congress intended IDEA to be the exclusive "vehicle for protecting the constitutional right of a handicapped child to a public education." *Id.* at 1010. *See also Honig v. Doe*, 484 U.S. 310 (1988) (holding that the EHA was not a "simple funding statute"). The Courts of Appeals have also understood IDEA to be both Section 5 and Spending Clause legislation. *See David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 421-422 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986); *Crawford* v.

(Cont'd)

Honig stated after reviewing the Act's legislative history and the problems that were the impetus for the Act:

> In responding to these problems, Congress did not content itself with passage of a simple funding statute, rather the EHA confers upon disabled students an enforceable substantive right to public education in participating states (citations and footnote omitted) and conditions federal financial assistance upon a state's compliance with the substantive and procedural goals of the Act.

484 U.S. at 310.

The Supreme Court has previously addressed and rejected the School District's *Pennhurst* argument that potentially costly services under the IDEA must be specifically enumerated. *Tatro*, 468 U.S. 883, 891 n.8 (1984). In *Tatro* the Court distinguished *Pennhurst* as follows:

> The obligation to provide special education and related services is expressly phrased as a "conditio[n]" for a state to receive funds under the Act. This refutes petitioner's contention that the Act did not "impos[e] an obligation on the States to spend state money to fund certain rights as a condition of receiving federal moneys" but "spoke merely in precatory terms ."

Id. (citations omitted).

In its analysis in *Tatro*, the Court made it clear that a service did *not* need to be specifically enumerated, contrary to the District's argument, as long as it was related to the express condition, which the Court stated was "the obligation to provide special education and related services." 468 U.S. at 891 n.8. As the Court stated, in

(Cont'd)
Pittman, 708 F.2d 1028, 1037-1038 (5th Cir. 1983); *Mitten v. Muscogee County Sch. Dist.*, 877 F.2d 932, 938 (11th Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990); *Counsel v. Dow*, 849 F.2d 731, 737 (2d Cir.), *cert. denied*, 488 U.S. 955 (1988) (so holding and collecting older cases).

spite of *not* being enumerated in the Act, a health-related service which permits a child to remain at school during the day is no less "related to the effort to educate than are services that enable the child to reach, enter or exit the school," which were indeed specifically enumerated services in the Act. 468 U.S. at 891.

The remaining Spending Clause cases relied on by the District for the proposition that a costly service does not need to be provided if it is not specifically enumerated do not support the District's position. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Supreme Court upheld the conditioning of a state's federal highway funds on adoption of minimum drinking age of 21. *Id.* at 207. The fighting issue in *Dole* was whether the Twenty-First amendment constituted an "independent constitutional bar" to the conditional grant of federal funds. *Id.* at 209. In *New York v. United States*, 505 U.S. 144 (1992), the Supreme Court upheld provisions of the Low-Level Radioactive Waste Policy Act. The petitioner did not contest Congress' exercise of its spending powers. 505 U.S. at 172. In dicta, the Court relied on *Pennhurst* for the proposition that the conditions imposed were "unambiguous." *Id.* In *Gebser v. Lago Vista Independent School Dist.*, 118 S. Ct. 1989 (1998), the Court held that under the Spending Clause, the recipients of Title IX funds (where a private right of action for sexual harassment was implied in the first instance) did not have sufficient notice of the imposition of money damages unless the recipient school district had actual knowledge of the harassment. *Id.* at 1998. Here, as this Court made clear in *Tatro*, there is an express condition under the IDEA giving rise to the obligation to provide education and "related services."

The District also relies on *Commonwealth of Virginia, Department of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997), in which the Fourth Circuit Court of Appeals rejected the United States Department of Education's position that a state was required to make special education services available to students with disabilities who were expelled or suspended where the state did not afford the same right to non-disabled students. 106 F.3d at

562. The Court of Appeals, relying on the Supreme Court's articulation of the purpose of the IDEA in *Board of Education v. Rowley*, 458 U.S. 176 (1982), found that the purpose of the Act, which was to "ensure that disabled students are not denied access to a free public education because of their disabilities," was not served by the requirement. 106 F.3d at 559. Here, the purpose of the statute will be served, which is to ensure that a disabled student is not deprived of access.

That the District's cost-related arguments under *Pennhurst* and Congress' spending powers must be rejected is also supported by the Court's decision in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), in which the Court: (1) recognized the broad scope of a student's right to an education at the district's cost; and (2) rejected the cost arguments of the district. The Court held that the school district was obligated to reimburse the parents of a learning disabled child for the cost of educating the child at a private school because the individualized education plan (IEP) was inadequate under the IDEA. 510 U.S. at 10. The Court so held even though the private school selected by the parents did not meet the IDEA's definition of free appropriate education and the school was not on the state's list of approved schools. 510 U.S. at 12-15. The Court rejected the school district's claim that "allowing reimbursement for parents such as [the student's] puts an unreasonable burden on financially strapped local educational authorities." 510 U.S. at 15. The Court stated:

> [t]here is no doubt that Congress has imposed a significant financial burden on states and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. *This is the IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.*

510 U.S. at 15 (emphasis added).[9]

An additional refutation of the District's cost argument is found in *Morton Community Unit School District No. 709 v. J.M.*, 1998 WL 420393 (7th Cir. 1998). The related services ordered in this case cost about $20,000 per year. *Id.* at *2. The Court noted that the School District had more than 3,000 students so that the annual cost of the nurse would be less than $7 per student. *Id.* at *4. The Court found that the financial burden on the district for the expense of hiring a nurse to attend plaintiff "would be slight." *Id. A fortiori*, the costs of even an additional R.N. in this case is approximately $1 per student. As stated above, there is no additional cost if an LPN is hired in this case.[10]

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9. Further, the District's cost argument is not particularly persuasive in any event, when there are cases such as *Clevenger v. Oak Ridge School Board*, 744 F.2d 514 (6th Cir. 1984) (approving placement of a child in a residential school at a rate of $88,000 per year because cost considerations are only relevant when choosing between several options, all of which offer an appropriate education) and *Cremeans v. Fairland Local School Dist.*, 633 N.E. 2d 570, 581 (Ohio Ct. App. 1993) (finding 24-hour-a-day extended school year residential placement required even though the cost of the program was approximately $94,000 out of a total District budget for education of students with disabilities of $572,000).

10. Petitioner and its amicus exaggerate the scope of their financial obligations by disregarding the fact that there are only a small number of school-age children who have needs comparable to Garret. All the litigated cases involving health monitoring in a regular classroom involve children who rely on ventilators and/or tracheotomy tubes for breathing. The congressional Office of Technology Assessment (OTA) estimated that in any given year there are between 680 and 2,000 children 21 years old and under who receive ventilator assistance. *See* United States Congress, Office of Technology Assessment, *Technology-Dependent Children: Hospital v. Home Care: A Technical Memorandum* 20-21 (1987). OTA also estimated that between 1,000 and 6,000 additional children under 21 breathe with the assistance of tracheotomy tubes. *See id.* at 22-24.

(Cont'd)

For the above-stated reasons, the District's reliance on *Pennhurst* is misplaced, and its cost arguments must be rejected.

G. The Bright-line Rule is Practical and is Consistent with Principles of Administration of Justice.

The importance of the bright-line rule is that it eliminates the costs, delay, and the general state of confusion that would result from the imposition of the multifactor test suggested by Petitioner which would require adjudication of varied factual circumstances through extensive appellate processes. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 48 (1981); *Weinberger v. Salfi*, 422 U.S. 749, 782-85 (1975); *Honig v. Doe*, 484 U.S. 310, 322 (1988) (explaining that administrative and judicial review under the IDEA are often "ponderous"). The bright-line test furthers the efficient and proper use of public funds earmarked for education and should avoid litigation over fact-specific disputes engendered by the multifactor test. *See Skelly v. Brookfield LaGrange Park School District 95*, 968 F. Supp. 385, 394 (N.D. Ill. 1997).

(Cont'd)

OTA's numbers overestimate the population relevant to school districts in two respects. First, they cover infants and toddlers (that is, children age 0-2) who do not receive school services and who may be weaned from the ventilator or tracheotomy by the time they are ready to enter school. *See* OTA Report, *supra*, at 15, 29. Second, they include children living in hospitals who receive health services from hospitals not school districts. One survey estimates that there are 570 ventilator-dependent patients under age 18 in hospitals. *See* American Association for Respiratory Care, *A Study of Chronic Ventilator Patients in the Hospital*, 11, 14 (1991). Thus the number of ventilator- and tracheotomy-dependent children who attend school and require ventilator/tracheotomy health services is likely at the lower end of the OTA estimates. A survey of school districts by the Iowa Department of Education in 1989 reported that 5 students were using ventilators and 17 were using tracheotomies. Richard Nelson, *et al.*, *A Survey of Special Health Care Procedures Required by Students in Iowa Schools* 2 (Feb. 1990) (copy lodged with the Court). In any event, that population constitutes the barest fraction of the 5.6 million children currently receiving special education and related services. *See* U.S. Department of Education, *Nineteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, II-23 (1997).

In contrast, the multifactor test is time-consuming and expensive in terms of school staff time and effort to apply the test and formulate the annual IEP required by the Act. The inevitable ensuing litigation would also be time-consuming and expensive. Further, the problem with the multifactor analysis proposed by Petitioner is that it suggests no guidance on which, if any, of the factors are determinative or how to weigh the various factors. Such a multifactor test may also result in differing results from one district to the next within the same state.

The bright-line rule further advances the national policy of mainstreaming or integration. This policy is evidenced by 20 U.S.C. § 1412(5) which provides:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Rather than draining financial resources of the federal and state governments, related services enable disabled children to obtain more than a "trivial educational benefit." This insures that the millions of dollars Congress spends for special education programs are not wasted. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3rd Cir. 1988); S. Rep. No. 168, 94th Cong., 1st Session 5 (1975) (reprinted in 1975 U.S.C.C. Ann. 1425, 1433).

The Petitioner's proposed multifactor test would be a practical nightmare with school districts tenaciously litigating IEP's (individualized educational plans) against financially overmatched

disabled children with the potential outcome of sending the children to home-based or hospital-based education programs. 20 U.S.C. § 1412(5).

If Garret F. is not allowed in school, his educational option, at this point, would be homebound instruction. Pet. App. at 37a-38a; Tr. at 87-88. Even from a purely educational standpoint, however, homebound teaching has significant limitations. It typically consists of only a few hours per week, with a single teacher expected to cover all the subjects the child is studying. American Academy of Pediatrics, *Children With Health Impairments*, 86 Pediatrics, 636 (1990).

The IDEA also requires that the "free appropriate public education" take place to the maximum extent possible with nondisabled children in the least restrictive environment consistent with the needs of the disabled children. 20 U.S.C § 1412(5).

Thus, the three principal advantages of the bright-line rule are that it: (1) effectuates the expressed intent of Congress and interpretation by the Department of Education; (2) it provides a workable standard for educators, disabled children and their families; and (3) it fosters mainstreaming and integration.

II.

EVEN IF THIS COURT DOES NOT FOLLOW THE BRIGHT LINE TEST, THE DECISION THAT THE DISTRICT IS REQUIRED TO PROVIDE THE SERVICES MUST BE AFFIRMED.

The Supreme Court may affirm on any ground in the record. *United States v. Carignan*, 342 U.S. 36, 38-39 (1951); *Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984).

A. The ALJ's Decision is Entitled to Deference Under This Court's Analysis in *Rowley*.

The ALJ's decision is correct and must be affirmed on alternative grounds. The ALJ ruled in the first instance that "[u]nder

Tatro and *Joshua S.* . . . the health care needs of Garret F. while at school do not require the direct attention and provision by a physician and do not fall within the physician treatment exclusion of related services," finding that under the IDEA such services must be provided by the district by a "qualified school nurse or other qualified person." The ALJ also found that "even when the other tests and criteria found in *Detsel, Bevin H.*, and *Shannon M.* are used, the health care services necessary for Garret are a related service." Pet. App. at 52a. The ALJ distinguished those cases *on their facts* finding that Garret's "general good health, ability to communicate his needs, intelligence, and other factors" distinguished him from the students in those cases, who were "more 'fragile' in the true sense of the word."[11] Pet. App. at 52a.

The facts that the ALJ relied on to find that Garret must be provided the services under a multifactor test included the fact that "it was obvious that in most situations a conscientious lay person could be, and has been in the past, trained to provide the necessary care." Pet. App. at 52a. Barring a change in condition, "there appears no practical need for Garret to be attended by even a licensed health care professional." *Id.* The ALJ's factual findings are entitled to deference. *Rowley*, 458 U.S. at 206.

As the Court stated in *Rowley*:

> [t]he very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a Court were permitted

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11. Garret can communicate his status through verbal speech. Tr. at 463. He is in good health. Tr. at 629. No care for the tracheostomy is done at school. Tr. at 34. The trach tube has never been changed at school and the ventilator has never malfunctioned at school. Tr. at 36. If the ventilator did malfunction, Garret can be ambu-bagged manually for a long period of time. Tr. at 36. At the time of trial it had been over one and a half years since there had been any school episodes of autonomic hyperreflexia. Tr. at 81-82. Neither Garret's blood pressure nor his pulse are taken during the school day. Tr. at 648. Garret has never had a close call or an emergency care situation at school. Tr. at 88.

> simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing Court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to those proceedings . . .

458 U.S. at 206.

The Iowa Department of Education reached the proper conclusion that the District is required to provide an individual to provide the health care services required by Garret F. during the day. This ruling is consistent with the purpose of the IDEA which, in part, is to ameliorate past discrimination against individuals with disabilities and their exclusion from the public education system. Further, it is consistent with the principle enunciated in *Rowley* that, under the Act, state and local educational agencies, in cooperation with the parents, have the primary responsibility for formulating the education to be accorded to a disabled child and that in the face of such a clear statutory directive, it "seems highly unlikely" that Congress intended the Courts to overturn a state's choice of appropriate educational options in a proceeding, such as this one, pursuant to Section 1415(e)(2). 458 U.S. at 207-08.

B. Even Under the District's Multifactor Test, the ALJ's Decision Must be Affirmed.

Under the District's own proposed test, Petitioner's Brief at p. 34-35, on the present record, the District *must* provide the nursing services requested. The District's proposed test is as follows:

> . . . [C]ourts should consider several factors in determining whether the services are excluded medical services or included school health services. These factors include the nature and complexity of the care, whether the care is continuous or intermittent, whether existing school health personnel may provide the services, the cost of the

> services, and the potential repercussions if the services are not properly performed.

Petitioner's Brief at p. 34-35. In order to prevail, the District would have to persuade this Court to reweigh the evidence, which is inconsistent with the deference accorded state boards of education under the IDEA as interpreted by this Court in *Rowley*, 458 U.S. at 206-07. That evidence is as follows.

1. *Nature and complexity of the care*

As the ALJ found, many of the services required by Garret can be and are provided by nonskilled personnel, including family members and unlicensed personal attendants. The District relies on its own IEP team's finding and the original declaratory ruling of the Nursing Board. The District neglects the fact that it was this plan that the ALJ rejected upon appeal by Garret's mother. The District further neglects the fact that the Board of Nursing has now specifically ruled that an LPN can provide the services.

2. *Whether the care is continuous or intermittent*

Despite the District's assertion to the contrary, the only medical evidence, given by Dr. Reinertson, was that Garret did not require continuous monitoring and assessment. Tr. at 627-28. Someone simply needs to be within "earshot" to respond to his needs. Tr. at 628. According to the District, no child, regardless of physical or mental disability, should be left unattended during the school day. Tr. at 410-12. The care he needs is intermittent and it can and has been provided by a lay person. App. 10-11; 19; Tr. at 68-69; 640-41; 653-55.

3. *Whether existing school health personnel may provide the services*

There has been much said about who can provide the services to Garret F. Curiously, although the District claims that the services must be provided by an RN, it has permitted Garret's family to furnish these services throughout the years first with an eighteen-year-old non-professional aunt and then with an LPN. Further, the

District now has an opinion from the Nursing Board that the services may be performed by an LPN.

4. *The cost of the service*

As argued above, Garret F. strenuously denies that costs should be a factor and asserts that there is no controlling precedent that would permit cost to be taken into account once the threshold question of whether the services requested are "supportive services" within the meaning of the IDEA is answered. However, even if cost is a factor, the actual costs of the services rendered in this case have been exaggerated by the District. Finally, the District has access to additional state money to finance these services. Pet. App. 37a; Tr. at 588.

5. *The potential repercussions*

Even if this were to be a relevant factor, which Garret F. denies, there is no evidence that the potential repercussions if the services were performed improperly would be greater if performed by a school nurse as opposed to the LPN hired by the parents. Further, the record in this case is that emergency breathing can be provided for a lengthy period of time through the use of ambu-bagging until emergency medical care arrives. Tr. at 473-74. For example, the Frey family sustained Garret's breath by use of the ambu-bag on a trip from Cedar Rapids, Iowa, to Denver, Colorado, and back. Tr. at 36. Also, the history of Garret at school shows that there has never been an emergency situation. Tr. at 88.

Thus, the District's argument under a multifactor analysis must fail and even if this approach were adopted, the judgment must be affirmed.

III.

AS A FURTHER ALTERNATIVE GROUND, THE JUDGMENT MUST BE AFFIRMED ON STATE LAW GROUNDS.

This Court as a general rule will not affirm on state law grounds. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 292 (1982). However, in IDEA cases, state law provisions for special education that create a higher duty for school districts than recognized by federal law have been held to be automatically incorporated into, and enforceable under, the IDEA. *See David D. v. Dartmouth Sch. Comm.*, 775 F.2d at 420. Thus, affirmance is proper under state law grounds. In the alternative, the Court could remand for a determination on state law grounds. *City of Mesquite*, 455 U.S. at 292.

The ALJ held that Garret F. was entitled to the services as "support services" under Iowa law. The Department of Education held that the District had the responsibility under Iowa Code Sections 256B.2 and .3 and Iowa Code Section 280.8 to provide the services. It stated:

> Under [the] Iowa statute Garret is a child requiring special education, and a six-year history of successful functioning in the regular classroom, with aids and services provided by his family and the school prove beyond a doubt that [education in regular classes] can be accomplished satisfactorily. Under state law, Garret must be provided an education program "within the regular school environment" and under the same state law; it is the District's responsibility to do so.

Pet. App. 55a.

The ALJ found that the alternative of a homebound program would "certainly not be an education with nondisabled children to the 'maximum extent appropriate' " within the meaning of federal regulations. Pet. App. 59a. The ALJ also properly noted that under

Iowa law, "only when a child 'cannot sufficiently profit from the work in the regular classroom' may he be removed." Pet. App. 59a; Iowa Code § 256B.8 (1993). The ALJ further found that the Iowa Board of Nursing's declaratory ruling that an RN was required to render the care did not relieve the District of responsibility to provide health care services to Garret at school. Pet App. 60a. Accordingly, the Court should affirm on this ground.

CONCLUSION

The judgment of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,
Petitioner,

v.

GARRET F., A MINOR BY HIS MOTHER AND NEXT FRIEND, CHARLENE F.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,
Petitioner,

v.

GARRET F., A MINOR BY HIS MOTHER
AND NEXT FRIEND, CHARLENE F.,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

REPLY BRIEF FOR THE PETITIONER

This case presents the question whether the Court should steer away from the plain language of the statute, its own decisions, and over a decade of nearly unanimous lower court rulings to hold that school districts have an obligation to provide continuous one-on-one nursing services, on the pretense that such services are not really "medical" because they are not personally administered by a physician. The "medical services" exclusion in the IDEA must be given its plain, everyday, common-sense meaning. As a result, the lower court decisions in this case must be reversed.

First, there is no question that Garret needs continuous one-on-one nursing services provided by a nursing professional, and that such nursing services would result in substantial additional costs to the District. At the same time, there is no basis to conclude that if the District prevails in this case, Respondent would be relegated to homebound instruction. For ten years, Respondent has attended the

Cedar Rapids public schools, even though the intensive nursing services that he requires have *not* been provided by the District.

Second, because the statutory language is paramount, the District will refocus on the real issue in this case: Does the term "medical services" in the IDEA include medical services as that term is commonly understood? In a number of other contexts, Congress, federal agencies, and the courts have defined "medical" assistance, care or services as embracing many services that are not personally administered by a physician.

Third, the District will show that a series of developments since the IDEA was enacted in 1975, including administrative regulations and interpretations, this Court's *Tatro* decision, and lower court decisions that have been implicitly ratified by Congress, strongly support a common-sense, practical view of the term "medical." Additionally, because the IDEA was enacted under the Spending Clause, not under the Fourteenth Amendment, it is a contract with the States, and should not be deemed to impose requirements on school districts unless the requirements are stated "unambiguously" in the legislation.

Fourth, the District will demonstrate that balancing is at the heart of the IDEA, and that a balancing test to determine whether a service is "medical" is both logical and feasible. Unfortunately, the administrative law judge did not perform a true balancing in this case, relying instead on his erroneous view of the law as limiting "medical services" to those directly provided by a physician.

THE FACTS FULLY SUPPORT THE DISTRICT'S ARGUMENTS.

A. Garret Requires Continuous, One-on-One Nursing Services.

The factual record shows, without question, that Respondent requires continuous, one-on-one nursing services that would impose considerable additional costs on the District if it lost this case. Respondent's own attending

physician, Dr. Reinertson, testified that a trained individual must be within "earshot" of Garret at all times. TR 628, 630. Dr. Reinertson also signed a certification that Garret requires a one-on-one nurse to care for his needs. TR 55-57.

Merely because the LPN who currently accompanies Garret at all times is not constantly performing a procedure upon Garret does not mean that his care is not "continuous." All of the witnesses agreed that Garret needed a personal attendant with him at all times, and that the school nurse, who is responsible for several hundred students in multiple buildings (there are six nurses serving the 33 school buildings in the District) would not be able to meet his needs. TR 244, 317-320.

Garret needs constant monitoring and assessment to determine if he is suffering respiratory distress and to ensure that his ventilator is properly functioning. TR 44-46, 408-409, 427. Because Garret is paralyzed, someone must attend to these needs for him. Garret also has a history of episodes of autonomic hyperreflexia, a life-threatening abnormal response of the nervous system. TR 52, 77-78, 81-82, 192, 200. At the time of hearing, Garret's mother testified that Garret had one or two such episodes within the prior year, albeit while at home, *and that he had experienced such episodes while at school prior to then.* TR 81-82. Dr. Reinertson, Garret's pediatrician, also testified that Garret was susceptible to further episodes and thus required "immediate care." TR 77-78.

B. There Would Be Substantial Additional Costs if the District Had to Provide Garret's Continuous, One-on-One Nursing Services.

Respondent also alleges that the District could provide Garret's continuous one-on-one nursing services with no additional outlay of funds because his educational associate in the 1994-95 school year also happened to be a licensed practical nurse. However, Garret's educational

associate for that year was not hired for and did not provide for Garret's medical needs. She helped him maneuver his wheelchair and manipulate his educational materials, but did not participate in his nursing care. TR 238, 414, 472, 521. Her annual compensation of approximately $9,500 was far below the annual compensation for nurses. EX 128 at 463; EX 137 at 520-521. The record demonstrates, and the ALJ found, that the educational associate was covered by a collective bargaining contract which provides a salary and benefits much lower than what is paid to employees hired to provide nursing services. J.A. 17; EX 128 at 463; EX 135 at 483-523; Pet. App. 34a-36a. The ALJ found that the increased costs for nursing services would be between $19,082.57 and $30,262.42. Pet. App. 36a. In any event, the current educational associate is not an LPN.

Moreover, there can be no dispute that the Iowa Board of Nursing requires a licensed nurse (either an LPN or an RN) to attend to Garret continuously. At the time of the hearing, the District had received a declaratory ruling from the Iowa Board of Nursing that Garret's care at school could not be delegated to a nonlicensed trained individual. EX 125 at 447-461. The Board of Nursing also has a regulation that school nurses must be registered nurses, and that licensed practical nurses may not be assigned to perform school nursing services unless there is a registered nurse in the "proximate area," defined as the same building. 655 Iowa Admin. Code §§ 6.1 & 6.3(4). Later, a second declaratory ruling was received from the Board of Nursing, indicating that while Garret's care could not be delegated to nonlicensed personnel, an LPN could perform the services so long as an RN determined the services could be safely performed and retained ultimate responsibility for the care. *Letter from Lois Churchill* (June 13, 1997) (copy lodged with the Court by the United States). Thus, the Board of Nursing has reiterated that a licensed nurse must care for Garret at all times when he is at school.

C. Garret Will Not Be Homebound.

Respondent and his amici imply, generally without directly saying so, that if the District does not pay for Garret's continuous one-on-one nursing, he could be relegated to homebound instruction with a teacher for just a few hours a week, isolated from nondisabled peers. The implication is untrue. For the past ten years, Garret has never been excluded from school, and he has been provided a wide array of services at no expense to enable him to attend school in regular classes. Pet. App. 19a, TR 106-109, 217, 516, 517. These services include a one-on-one associate, thousands of dollars worth of special software, special equipment to enable him to manipulate his computer and a special lift bus to accommodate his wheelchair (which is larger and heavier than usual because of the ventilator). TR 207-208, 515-517.

Also, there are nondistrict resources available to pay for Garret's nursing services: a combination of private medical insurance and a settlement trust fund expressly established to cover Garret's needs. TR 89-93. The question is not whether Garret may attend school, but rather who pays for the nursing services which he requires both at home and school, while he is at school.

ARGUMENT

I. THE TERM "MEDICAL SERVICES" AS USED IN THE IDEA MUST HAVE A PRACTICAL, COMMONSENSE MEANING.

Any consideration of the IDEA's medical services exclusion must begin with the statute. The importance of the statutory language is paramount. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). "Medical services" must be given its "ordinary, contemporary, common meaning." *See Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997). Congress and several courts have repeatedly defined "medical" as including services beyond those actually administered by a physician, including nursing services. This traditional defi-

nition of "medical" reflects practical realities and common sense.

As the Seventh Circuit recently said in analyzing the medical services exclusion of the IDEA, a bright-line physician/nonphysician distinction is "unrealistic." *Morton Community Unit Sch. Dist. No. 709 v. J.M.*, 1998 U.S. App. LEXIS 17079 at *7 (7th Cir. July 27, 1998). Most medical services, "as a matter of economy and specialization, are provided by nurses, nurses' aides, paramedics, medical technicians, medical students, the patients themselves, and members of the patient's families, rather than by physicians." *Id.* Respondent and the United States' definition of "medical services" is not "contemporary"; it is archaic.

Respondent attempts to cite several federal statutes to support an unduly narrow definition of "medical" as "limited to services directly provided by a physician." But unlike the authorities cited by the District, such as the well-established definition of "medical care" in the Internal Revenue Code, 26 U.S.C. § 213(d)(1), none of these statutes cited by Respondent actually *defines* the term "medical." Moreover, far from supporting Respondent, many of the statutes cited by Respondent bolster the District's position that "medical" encompasses services performed by nonphysicians.

For example, 38 U.S.C. § 101(28), relating to veterans' benefits, does not actually define "medical services" but strongly implies that such services can be performed "under the general direction of" physicians. Moreover, another provision, 38 U.S.C. § 1701(6), *expressly* defines "medical services" to include rehabilitative services, surgical services, dental services, appliances, optometric and podiatric services, and preventive health-care services.

Likewise, 42 U.S.C. § 1397cc(c)(1)(B) suggests there is a subcategory of "medical services" provided by "physicians," and correspondingly there are medical services not provided by physicians. Additionally, while 5 U.S.C. § 8103(a) (also cited by Respondent) does not define

"medical services," the implementing regulations do, and the definition supports the District. *See* 20 C.F.R. § 10.400(e) (the term "medical services" includes "services and supplies provided by *or under the supervision of* physicians (M.D. and D.O.), surgeons, podiatrists, dentists, clinical psychologists, optometrists, and chiropractors. . . .") (emphasis added).

In summary, when Congress or a federal agency has defined the term "medical" in connection with "assistance," "care" or "services," none of the definitions has been limited to services directly administered by a physician.

II. THE LEGISLATIVE HISTORY OF THE IDEA, WHILE SPARSE, SHOWS THAT CONGRESS INTENDED A MEANINGFUL "MEDICAL SERVICES" EXCLUSION.

The legislative history of the IDEA as enacted in 1975 shows that Congress made a deliberate choice to exclude "medical services" (other than for diagnosis and evaluation) from the services that school districts had to provide. This was no mere accident.

As originally introduced in the 94th Congress, the precursors to the IDEA, S. 6 and H.R. 7217, defined "related services" to include "medical" services. The House and Senate Committees then conducted hearings in the spring of 1975, during which there was extensive discussion of the costs of special education. Before they were reported to the floor, both S. 6 and H.R. 7217 were modified to exclude medical services generally. *See* H.R. Rep. No. 332, 94th Cong., 1st Sess., June 26, 1975, at 42-43 (related services includes medical services, "except that such medical services shall be for diagnostic and evaluation purposes only"); S. Rep. No. 168, 94th Cong., 1st Sess., June 2, 1975, at 62 (related services does not include medical services). Ultimately, the Conference Committee approved the House language. S. Conf. Rep. No. 455, 94th Cong., 1st Sess., Nov. 14, 1975, at 30. Nothing in this legislative history supports or even suggests a

cramped interpretation of the term "medical services" to mean only services performed by a physician.

III. DEVELOPMENTS SINCE THE IDEA WAS ENACTED STRONGLY SUPPORT THE DISTRICT'S POSITION ON EXCLUDED MEDICAL SERVICES.

Since 1975, a series of developments have occurred which confirm that the "medical services" exclusion should not be limited artificially and exclusively to services which must be personally administered by a physician. These developments include: (1) regulations and administrative interpretations of the IDEA; (2) legislative amendments; (3) the Supreme Court's decisions in *Rowley* and *Tatro*; and (4) a succession of lower court rulings, including decisions by six separate United States Courts of Appeals, that have been implicitly ratified by Congress.

A. The Department of Education's Regulations and Interpretations Do Not Favor a Bright-Line Rule.

Respondent and the United States argue that deference should be given to the regulations of the Secretary of Education. However, the question is, "deference to what?" As previously discussed, the regulations have never defined *excluded* medical services. Nor has the Department prior to this case ever adopted a bright-line interpretation of the medical services exclusion in the context of continuous one-on-one nursing. *See generally J.M.*, 1998 U.S. App. LEXIS 17079 at *8 (characterizing the government's statements in this case about its own interpretations of the medical services exclusion as "inaccurate").

As promulgated in 1977, the regulations contained (and still contain to this day) a narrow definition of *included* medical services as "services provided by a licensed physician to determine a child's medically related [disability] that results in the child's need for special education and related services." 42 Fed. Reg. 42479 (1977). Given the concerns about the impending costs of complying with the Act, it is logical to conclude that the Department wished

to limit strictly the diagnostic and evaluative medical services that would be *covered*. The Department did not need to provide a definition of *excluded* medical services because "medical services" already had a common meaning. Had the Department wished to attach a restrictive meaning of *excluded* medical services, it could have simply adopted a regulation to that effect, just as it did for included diagnostic/evaluative medical services.

In January 1981, the Secretary of Education issued a notice of interpretation of these regulations which supports this view. 46 Fed. Reg. 4912 (1981). In that notice, the Secretary interpreted the IDEA and its regulations as requiring the provision of clean intermittent catheterization ("CIC") to disabled students during the school day. However, the result is less significant than the Secretary's reasoning.

Since CIC is not required to be provided by physicians, the Secretary could have made the required "interpretation" very quickly if she believed that the existing regulations established a "bright-line" rule limiting excluded medical services to physician-provided services. But the Secretary did not follow that approach, and in fact, did not even mention the included medical services regulation. Rather, she made a far lengthier and more balanced argument which emphasized that CIC was "a relatively simple procedure" that could be performed by a school nurse or another responsible person, "none of whom need to be licensed to perform that service." *Id.* The Secretary also said at the same time that school districts did not need to provide "routine medical services, such as laboratory analysis," even though such services are generally not administered by physicians. A bright-line interpretation of excluded medical services was clearly not contemplated in January of 1981.

Even more importantly, in May 1981, the Department indefinitely postponed its CIC interpretation, stating that the existing regulations were "ambiguous" concerning the differentiation between related services and medical serv-

ices. 46 Fed. Reg. 25614 (1981). It is inconceivable that the Department would have withdrawn the CIC interpretation because the regulations were "ambiguous," if it believed the regulations established a bright-line physician/nonphysician rule for excluded medical services. Such a bright-line rule would clearly have required school districts to provide CIC.

The Secretary's efforts to revise the regulations in 1982 do not alter this analysis. At most, the Secretary stated at that time that there were "problems . . . . determining whether certain health-related services are to be provided." 47 Fed. Reg. 33837 (1982). The Secretary did not say there had been or should be a "bright-line" rule governing *excluded* "medical services." While the Secretary's attempt to narrow sharply the definition of "related services" ran into congressional opposition and was later withdrawn, there is no indication that anyone believed continuous one-on-one nursing services would be a covered service or that only physician services would be excluded.

Yet again as recently as 1996, the Department could not "express a view as to whether one-on-one nursing services are a required related service." Pet. App. 67a. The United States argues that this recent interpretation from the Department merely "acknowledged that courts have reached differing conclusions" and that the letter "reaffirmed the Secretary's longstanding interpretation of IDEA that services provided by a nurse are not excluded medical services." However, the 1996 interpretation at no time mentions a longstanding bright-line distinction, nor does it ever say that services provided by a nurse are not excluded medical services. Rather,

> the determination as to whether [one-on-one nursing services] are a required related service for an individual disabled student must be made on a case-by-case basis. [Pet. App. 67a]

Again in 1996, the Department commented:

> If the services are not for diagnostic and evaluative purposes and could be provided by another qualified

> professional, they *may* be "school health services." The determination as to whether a particular related services is a "school health service" or a "medical service," not for diagnostic and evaluation purposes must be made on a case-by-case basis. [Letter to Anonymous, 25 Ind. Disab. Educ. L. Rep. 531, 532 (Nov. 13, 1996)] (emphasis added).

The Department could have answered these questions simply by saying that if necessary services need not be provided by a physician, they are "related services." It did *not* do so, thereby demonstrating the fallacy of the argument that the Department has consistently and clearly applied a physician/nonphysician distinction to defining "medical services." [1]

It is well-settled that inconsistent agency interpretations are entitled to considerably less deference. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142-43 (1976). Moreover, an agency interpretation that conflicts with the plain language of the statute is entitled to no deference at all. *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989); *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 837 (1983).

B. Later Legislative Amendments to the IDEA Confirm That "Medical" Must Have a Common-Sense Meaning.

A 1986 amendment to the IDEA inserting the term "medical" into another section of the Act also supports

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[1] In its brief, the United States makes much of some policy letters that the Department issued in the late 1970's relating to the provision of psychotherapy services. Since "psychological services" and "counseling services" are expressly required to be provided by school districts under the IDEA, the Department confronted a different question than is presented here. The Department had to decide whether non-physician psychotherapy was a "psychological" service or a "medical" service, and in several letters, it concluded that it was a psychological service if not provided by a psychiatrist. These letters do not resolve the issue presented in this case, and indeed they were not cited in the Department's 1996 letters on continuous nursing services.

the District's position. In 1986, the following provision was added:

> This chapter shall not be construed to permit a State to reduce *medical* and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act *with respect to the provision of a free appropriate public education* for children with disabilities within the State. [20 U.S.C. § 1413(e)] (emphasis added)

This supports the District's contention that "medical" means more than just physician services in the related services exclusion. Otherwise, no medical services would be listed in the amendment because they would not be deemed "with respect to the provision of a free appropriate public education," thus rendering the 1986 statutory provision meaningless.

Psychological, physical therapy and occupational therapy are also commonly viewed as "medical services"; thus these services needed to be specifically listed as related services in order to avoid falling under the express "medical service" exclusion of 20 U.S.C. § 1401(a)(17). However, it is noteworthy that Congress did not identify private-duty nursing as a related service, presumably then believing that it would be an excluded medical service.

C. This Court's Decisions Do Not Favor a Bright-Line Rule.

The question whether a school district was required to provide CIC under the IDEA reached this Court in *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). Some language in *Tatro* can be read as favoring a bright-line rule. But those statements were not necessary to the Court's decision, and they go against much of the Court's reasoning. For the most part, this Court emphasized in *Tatro* that CIC was not "beyond the range of [schools'] competence," was "difficult to distinguish from" services traditionally provided by school nurses to nondisabled children, and was a service of a kind "routinely provided

to the nonhandicapped." 468 U.S. at 892-94. These were the critical factors enunciated by the Court in determining that the Irving School District had to provide CIC to Amber Tatro. This balanced, nuanced approach was consistent with the Court's earlier decision in *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

D. Lower Court Decisions Do Not Favor a Bright-Line Rule.

The lower courts have overwhelmingly read *Tatro* as adopting a balanced approach to the "medical services" exclusion. If *Tatro* endorsed a bright-line physician/non-physician rule, it is difficult to explain why lower courts, almost without exception, have read *Tatro* otherwise. Six Circuit Courts of Appeals, as well as several lower courts, have held that the "medical services" exclusion is not limited to services directly provided by physicians.[2] The prevailing view, as the Fourth Circuit stated, is that "such an arbitrary classification ignores reality." *Tice*, 908 F.2d at 1209 n.13. Indeed, the Seventh Circuit recently used the terms "arbitrary" and "extreme" to describe the attempt to confine the term "medical services" to "services rendered by a licensed physician." *J.M.*, 1998 U.S. App. LEXIS 17079 at *13.[3]

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[2] *See Detsel v. Board of Educ. of Auburn Enlarged City Sch. Dist.*, 820 F.2d 587, 588 (2nd Cir. 1987) (per curiam), *aff'g* 637 F. Supp. 1022 (N.D. N.Y. 1986), *cert. denied*, 484 U.S. 891 (1987); *Fulginiti v. Roxbury Township Pub. Sch.*, 921 F. Supp. 1320 (D.N.J. 1996), *aff'd without published opinion*, 116 F.3d 468 (3rd Cir. 1997); *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1209 n.13 (4th Cir. 1990); *Neely v. Rutherford County Sch.*, 68 F.3d 965, 969-973 (6th Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996); *Morton Community Unit Sch. Dist. No. 709 v. J.M.*, 1998 U.S. App. LEXIS 17079 at *6-8, *13 (7th Cir., July 27, 1998); *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635, 642-44 (9th Cir. 1990) (per curiam); *Bevin H. v. Wright*, 666 F. Supp. 71, 75 (W.D. Pa. 1987); *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020, 1030 (D. Utah 1992); *Ellison v. Board of Educ. of Three Villages Central Sch. Dist.*, 597 N.Y.S.2d 483 (App. Div. 1993).

[3] The Seventh Circuit ultimately ruled for the disabled student based on "the principle of judicial deference to the factual, judg-

Except for the Eighth Circuit's opinion in this case, only three reported decisions have adopted the bright-line distinction since *Tatro* was decided fourteen years ago. The reasoning of all of those district court decisions has been disapproved by their respective appellate courts.[4]

The significance of this body of case law is that Congress has made no attempt to overturn these decisions legislatively, even as recently as June of 1997, when it amended the IDEA by adding "orientation and mobility services" to the list of required related services. Pub. L. 105-17, 111 Stat. 45. This is strong evidence that Congress agreed with the courts. Congress could not have been unaware of these decisions, particularly in light of the large body of literature that discussed them. While the United States argues that Congress "ratified" a bright-line rule it is far more logical to argue that Congress ratified the prevailing balancing approach.

IV. BECAUSE IT IS CLEARLY A SPENDING CLAUSE ENACTMENT, THE IDEA'S OBLIGATIONS ON SCHOOL DISTRICTS MUST BE NARROWLY CONSTRUED.

Respondent and the United States argue that the IDEA was enacted pursuant to Section 5 of the Fourteenth

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mental, or discretionary decisions of the front-line administrative decision-makers." *Id.* at *14. But such deference would be improper here because, as the District has already extensively argued, the ALJ fundamentally made a *legal* determination, *i.e.*, that the "medical services" exclusion is controlled by a bright-line physician/non-physician distinction. That legal determination was erroneous.

[4] *See Skelly v. Brookfield LaGrange Park Sch. Dist. 95*, 968 F. Supp. 385 (N.D. Ill. 1997); *Morton Community Unit Sch. Dist. No. 709 v. J.M.*, 986 F. Supp. 1112 (C.D. Ill. 1997); and *Macomb Intermediate County Sch. Dist. v. Joshua S.*, 715 F. Supp. 824 (E.D. Mich. 1989). Respondent cites *Tanya v. Cincinnati Bd. of Educ.*, 651 N.E.2d 1373 (Ohio App. 1995), as purportedly favoring a bright-line rule. But the critical points in that decision were that one-on-one nursing services were not required and that the necessary accommodation was "not unduly burdensome." *Id.* at 1376-77. The court expressly declined to reach the question whether full-time nursing constitutes "medical services" or "related services." *Id.* at 1377 n.1.

Amendment and, therefore, the usual rule of construction for Spending Clause enactments does not apply. However, *Rowley* squarely holds that the IDEA must be treated for statutory interpretation purposes as a Spending Clause enactment. 458 U.S. at 204 n.26.

Moreover, this argument ignores the position taken by the federal government at the very outset that the IDEA was enacted pursuant to the Spending Clause only. In 1976, when regulations implementing the IDEA were first proposed, the Department of Health, Education and Welfare (predecessor to the Department of Education) acknowledged that the IDEA was not a direct mandate but merely imposed a series of conditions on the receipt of funding. The Department said, "[A] State which elects not to receive a grant under Part B [of the IDEA] *is not subject to its provisions.*" 41 Fed. Reg. 56967 (1976) (emphasis added).

V. USING A MULTI-FACTOR TEST FOR "MEDICAL SERVICES" IS CONSISTENT WITH DETERMINATIONS MADE IN OTHER CONTEXTS UNDER THE IDEA.

A. Balancing Pervades the IDEA.

The District has proposed, consistent with numerous lower court decisions, to use a multi-factor test to determine if services are excluded "medical services," including examining the nature and extent of the services and the burden on the district. Respondent and his amici have argued this is an onerous test that will lead to inconsistent provision of services across the country and unnecessary litigation. However, the IDEA is premised upon the mandate that decisions are to be based on individualized determinations on a case-by-case basis, and many multi-factored and balancing tests are utilized under the IDEA.

The nature and extent of required services are examined in making determinations for Medicaid assistance and for private insurance coverage. These determinations go well beyond merely identifying whether the service must be performed by physicians. Medicaid, which is expressly defined as "medical assistance," may include "pri-

vate duty nursing." 42 U.S.C. § 1396d(r), incorporating services in § 1396d(a). In this case, Garret's private insurer determined that his needed one-to-one attendant services qualified as "medically necessary services," thus entitling him to payment for a nurse to accompany him to school. TR 168. Similarly, several courts have examined the nature and extent of necessary services to make a determination of whether the requested services were "medical" in nature. *See* § III.C, *supra*.

This balancing test is no more difficult to apply than other IDEA balancing tests. For example, the eligibility of a child for services is made only after an individualized consideration of testing and evaluation materials which must consider the nature and extent of the child's deviation from his or her nondisabled peers. 20 U.S.C. § 1412 (5)(C). Likewise, the courts apply balancing tests in determining the appropriate placement for a child and whether the "*nature and severity* of a disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.* § 1412(5)(B) (emphasis added). *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987); *Schuldt v. Mankato Ind. Sch. Dist.*, 937 F.2d 1357 (8th Cir. 1991); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989). Balancing tests are also used in making disciplinary decisions for children with disabilities. *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 2557 (1995). These determinations may lead to different decisions, including level of services, for similarly situated children across the country. But what is lost in consistency is gained in flexibility and practicality.

B. Respondent's Criticisms of the Balancing Test Are Misplaced.

Respondent argues that adoption of a bright-line physician/nonphysician distinction "eliminates the costs, delay, and the general state of confusion that would result from

the imposition of the multifactor test . . . which would require adjudication of varied factual circumstances through extensive appellate processes." However, the test proposed by the District is exactly the type of balancing test currently used in making eligibility, placement and service decisions under the IDEA. 20 U.S.C. § 1414(a)(5). The ease of applying the balancing test was demonstrated in the IEP team meeting for Garret in which determinations were made as to the services Garret needed, that Garret required continuous care by an appropriately licensed practitioner, that existing school nurses could not provide the services, and that his care, if not properly performed, could be life-threatening. EX 991 at 364-368; J.A. 14-16.

The bright-line physician/nonphysician test, while seemingly simple, in fact does not lead to uniformity or consistency, nor is it a viable test over time. "In recent years, nonphysician clinicians have provided increasing amounts of health care that, in the past, has been provided principally by physicians." Richard A. Cooper, *Roles of Nonphysician Clinicians as Autonomous Providers of Patient Care*, 280 JAMA 795 (1998). "Physicians are no longer seen as the sole provider" of "physician services." Richard A. Cooper, *Perspectives on the Physician Workforce to the Year 2020*, 274 JAMA 1534, 1541 (1995).

State and federal regulations that determine what functions nonphysicians are permitted to perform have seen sweeping changes in recent years. In 1995 alone, state legislatures enacted more than 300 laws regarding scope of practice and reimbursement for nonphysicians, "virtually all" of which "increase[d] the authority of nonphysicians in areas long reserved to physicians." Catherine M. Dower, *et al., Changing Nature of Physician Licensure: Implications for Medical Education in California*, 168 Western J. of Med. 422, 424 (1998). In 1996, legislators introduced another 200 such bills and enacted 100 such laws. *Id. See also* Arlyss L. Anderson, *et al., Practice Environment for Nurse Practitioners in California: Identifying Barriers*, 165 Western J. of Med. 209

(1996) (citing the "wide variation in the use and scope of practice of nurse practitioners from state to state").

Federal regulations also reflect the evolution of physicians' and nonphysicians' respective roles. OSHA, which traditionally had required physicians to perform evaluations mandated in health standards, recently began to allow nonphysician health professionals to perform evaluations. *See* Howard M. Sandler, *Move Over, Physicians: OSHA's New Approach to Evaluations,* 60 Occupational Hazards, April 1998, at 17. Insurers, including the federal government through Medicare, increasingly treat nonphysicians as covered "providers." Under the Balanced Budget Act, beginning this year nurse practitioners, clinical nurse specialists and physician assistants are treated as Medicare-covered providers.

C. The Government's Criticisms of the Balancing Test Are Misplaced.

The United States argues that the five-factor test proposed by the District is contradicted by examples of "related services" contained in the statute. Yet the United States fails to recognize that "psychological services" and "physical and occupational therapy," unlike medical services, are expressly required as related services. Thus, the continuous and extensive nature of those services is not a consideration in determining the student's entitlement to them. Congress may well have listed certain services as required in order that they would not be viewed as medical services; Congress did not list private-duty type nursing.

Similarly, the United States misreads the District's contention that consideration should be given to whether a *school* nurse can provide the services. The Department's own regulations define related services to include "school health services" which are "services provided by a qualified school nurse or other qualified person." 34 C.F.R. §§ 300.16(a) and 300.16(b)(11). In specifically requiring "school" health services and not just "health services," it was contemplated that some health services are not

required school health services, and in defining the services as provided by a "school" nurse, it must mean there was some recognition that school nurses are not private-duty nurses. One-on-one private duty-type nursing is not a service traditionally or generally provided by school nurses who provide services to several hundred students (TR 441-42, 470, 477-480), and certainly there is nothing in the record when the regulations were promulgated to indicate that the Secretary considered such intensive nursing services to be school health services. Therefore, school nurses may be required to provide certain intermittent health services required by children with disabilities, such as tube feedings and CIC (currently provided by District nurses) (TR 333-37, 380-83), since they can be provided in the context of their total school nursing duties. It is a far stretch to rule that districts must hire a nurse full-time for a single student.

D. The District Should Prevail Under a Balancing Test.

Respondent attempts to argue that he would prevail even under a balancing test. However, as has been previously pointed out, the ALJ in this case did not apply a true balancing test, but simply said that Garret was not as "fragile" as the students in some of the other lower court cases. Pet. App. 52a. When a true balancing is performed, all the relevant factors weigh in favor of classifying the services as "medical." Garret cannot be left without a trained attendant with him at all times to make nursing assessments. TR 44-45, 427, EX 91 at 388. The Iowa Board of Nursing has specifically ruled that a licensed nurse (minimally an LPN) is required to provide the services because of the nature and complexity of the care. The nurse may not see to the needs of any other children in the building or in any other buildings while attending to Garret. TR 469-470. Without the services provided by the LPN, Garret could be in a life-threatening situation at any time. Hiring a special LPN for Garret would cost over $30,000. Under a balancing test, the requested services are "medical."

VI. THIS CASE SHOULD NOT BE AFFIRMED ON STATE LAW GROUNDS.

Since neither of the lower federal courts addressed the state law issues, they should be considered on remand. Moreover, for all practical purposes, the relevant Iowa law is the same as the IDEA. If Petitioner prevails on the IDEA issues, it is entirely likely that the lower courts will find for Petitioner on the state-law issues.

The ALJ relied upon language in the Iowa statute which defines "special education" as including "corrective and supporting services." This language mirrors the definition of "related services" in the IDEA. *Compare* § 256B.2(3) of the Iowa Code *with* 20 U.S.C. § 1401 (a)(17). The Iowa Department of Education has also adopted the federal definition of "related services," including the specific exclusion of medical services. 281 Iowa Admin. Code § 41.94(2)(d) (1995). Furthermore, the Iowa Supreme Court has already ruled that variations in language between the federal and state laws do not grant greater rights of entitlement to special education services under state law. *Buchholtz v. Iowa Dept. of Public Instruc.*, 315 N.W. 2d 789 (Iowa 1982).

CONCLUSION

The decision of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,
PETITIONER

v.

GARRET F., A MINOR BY HIS MOTHER AND
NEXT FRIEND, CHARLENE F.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, requires States receiving federal special education funds to provide special education and "related services" to students with disabilities. "Related services" are defined to include supportive services that are required to assist a child with a disability to benefit from special education, but exclude "medical services" unless they are for diagnosis or evaluation. 20 U.S.C. 1401(a)(17).

The question presented is:

Whether the Secretary of Education's "related services" regulation, 34 C.F.R. 300.16, reasonably interprets the "medical services" exclusion to exclude only services provided by a physician, and not health services provided by a qualified school nurse or other qualified non-physician.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1793

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,
PETITIONER

v.

GARRET F., A MINOR BY HIS MOTHER AND NEXT FRIEND, CHARLENE F.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States Department of Education has responsibility for the administration and enforcement of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. 1413(c), 1416(a), 1417(b), 1420. In response to the Court's invitation, the United States filed a brief as amicus curiae at the petition stage in this case.

STATEMENT

1. a. Respondent is a student in the petitioner school district. He was severely injured in an accident in 1987, when he was four years old. Pet. App. 9a, 19a.[1] The accident left him paralyzed from the neck down. Respondent has com-

[1] Our factual statement includes facts set forth in the decision of the Iowa state administrative law judge (ALJ), as well as the record before the ALJ. Neither party introduced any additional evidence before the district court. The ALJ's factual findings are treated as correct in petitioner's submissions to this Court and are entitled to due weight. See *Board of Educ. of Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 206 (1982).

plete head movement, has normal mental capacity, is able to speak, is able to operate his motorized wheelchair through use of a puff and suck straw, and is able to control his computer through the use of a device attuned to his head movements. *Id.* at 9a, 19a; Tr. 29, 84-85, 291-292. Respondent is "academically successful in school" and, at the time of the administrative hearing, his most recent report card included several A's, one B-plus, and one C. Pet. App. 19a. Respondent is knowledgeable about his health care and is able orally to instruct others about his needs. *Id.* at 20a; Tr. 79-80, 85, 463.

Respondent's respiratory muscles are paralyzed, so that he needs external aids to breathe, usually an electric ventilator. Pet. App. 19a, Tr. 41. The ventilator is connected to a tube inserted into an incision in his trachea (a tracheotomy tube). Tr. 332. From time to time, it is necessary to suction respondent's lungs through the tube to remove secretions that would normally be discharged by swallowing or coughing; the ventilator signals when that is necessary. Tr. 37. During the suctioning process, and during any other period when the ventilator is not functioning, air must be pumped in manually through an air bag attached to the tracheotomy tube. Pet. App. 19a, 24a. That suctioning and bagging are simple processes regularly performed by respondent's friends and family. Pet. App. 21a; Tr. 32, 176-177.

When respondent is not at school, his health care is provided during the day and on weekends by family members and friends who are familiar with his needs. Pet. App. 21a. On week nights, a health care provider is in respondent's home during the sleeping hours to attend to his needs, including turning him in his sleep every two hours. *Ibid.* That health care provider is a licensed practical nurse (L.P.N.) who is supervised by a registered nurse (R.N.) who is not on site. *Ibid.*

b. In the fall of 1988, respondent began attending school in the petitioner school district. Pet. App. 19a, 23a. Respondent needs special assistance with his education program and with health matters in order to benefit from that education program. Pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, Iowa receives federal special education funds and is, therefore, required to provide "special education and related services" to respondent and other students with disabilities. 20 U.S.C. 1400(c). "[R]elated services" are defined by statute to include supportive services that are required to assist a student with a disability to benefit from special education, but exclude "medical services" unless they are for diagnosis or evaluation. 20 U.S.C. 1401(a)(17).

Petitioner provides respondent special education and certain related services, including special assistance through a one-on-one teacher associate who continuously helps with respondent's needs such as page turning, note taking, computer set up, transporting of books, and maneuvering about the school building; special transportation services; and occupational therapy. Pet. App. 27a, 58a; Tr. 29-30. And petitioner provides devices, such as a computer, special software, and other instructional materials, that serve respondent's unique educational needs. Pet. App. 27a; Pet. 3. Petitioner does not dispute its statutory responsibility to provide the foregoing services.

In 1993, when respondent was about to start fifth grade, his family requested that the petitioner school district, pursuant to its obligations under IDEA and Iowa special education law, provide respondent certain health services that he needs in order to assist him to benefit from special education.[2] Respondent requested that petitioner make

[2] In earlier years, respondent's parents apparently had made similar requests that had been denied, Pet. App. 23a, Tr. 94-95, 637-638, and the family had managed to pay for the health services through a combination of a settlement fund from respondent's accident and insurance policies (of which one ceased payment because the coverage limit was reached and an-

available someone to be in the vicinity of respondent: to assist with the ventilator management as described above; to assist with urinary bladder catheterization once a day; to suction respondent's tracheotomy tube as needed (or once every six hours); to get respondent into a reclining position for five minutes of each hour; and to be available for emergency procedures in the unlikely event respondent experiences autonomic hyperreflexia. Pet. App. 20a.[3] Respondent has never needed emergency care at school. *Id.* at 23a; Tr. 392.

Petitioner refused to pay for the requested health services. Although an individualized education program (IEP) was developed for respondent as required by IDEA,[4] school district staff members declined to include the requested services as part of that IEP, based "on advice from legal counsel" that the services were excluded "medical services" rather than "related services." Pet. App. 25a; Tr. 512, 524, 568-569; Exh. 93 at 390.

2. Respondent pursued an administrative appeal and, after a three-day evidentiary hearing, an Iowa state administrative law judge (ALJ) ruled in his favor. Pet. App. 17a-63a. The Iowa ALJ held that the health care services required by respondent are "related services" which must be

other has an annual coverage limit that is normally exceeded by mid-year), Pet. App. 20a-21a.

[3] The ALJ found that autonomic hyperreflexia is an adverse reaction to anxiety or a full bladder that affects blood pressure and heart rate; respondent has experienced autonomic hyperreflexia rarely, and never at school, and it has usually been alleviated by catheterization. Pet. App. 20a.

[4] In States receiving IDEA funds (which as of August 1998 includes all States), each child with a disability must receive an "individualized educational program" (IEP) each year designed by a team that includes school representatives and parents. The team determines what services a child requires to receive a "free appropriate public education" in a regular education environment "to the maximum extent appropriate." 20 U.S.C. 1401(a)(18) and (20), 1412(5)(B), 1414(a)(5); *Honig* v. *Doe*, 484 U.S. 305, 311 (1988); *Rowley*, 458 U.S. at 181-182, 202.

provided by the district and not "medical services" excluded from that requirement by IDEA under 20 U.S.C. 1401(a)(17). Pet. App. 52a. The ALJ relied on *Irving Independent School District* v. *Tatro*, 468 U.S. 883 (1984), in which "the Court affirmed a Congressional and administrative distinction between nursing services and medical treatment as a related service" under IDEA. Pet. App. 43a. *Tatro* applied the Secretary's regulation providing that "the services of a school nurse could be required as a related service, and treatment by a 'licensed physician' could be excluded" under IDEA as a "medical service," finding that the regulation was a reasonable interpretation of the statute. *Id.* at 42a, 44a. The ALJ noted that *Tatro* did not treat expense, or the extent of the services required, as a factor for courts to consider. *Id.* at 42a. The ALJ ruled that a service is an excluded "medical service" if "the service '*must* be performed by a physician.'" *Id.* at 51a (quoting *Tatro*, 468 U.S. at 894). Applying that standard, the ALJ determined that the health care services required by respondent at school can be "provided by a 'qualified school nurse or other qualified person' and are thus 'school health services' required by IDEA as a related service." Pet. App. 52a.

Furthermore, the ALJ ruled that, even under the multifactor test applied by some courts that weighs expense, burden, extent and nature of the services, the health care services required by respondent are "related services" under IDEA. Pet. App. 52a.[5] The ALJ noted that the services

[5] The cost of the required services depends primarily on the licensure of the person providing them, *i.e.*, a registered nurse (R.N.) is more expensive than a licensed practical nurse (L.P.N.) or a nonlicensed trained care provider. See Pet. App. 34a-36a. The parties agree that the services at issue need not be provided by a physician, but disagree regarding whether an R.N., an L.P.N., or a trained care provider is required. *Id.* at 20a. Petitioner contended below that an R.N. was required, but the Iowa Board of Nursing ruling on which petitioner relied was changed at petitioner's request following its loss below. See U.S. Amicus Br. on Pet. 9-10.

needed by respondent are similar to services already provided to other students in petitioner's school district—petitioner provides other students urinary catheterization, help with food and drink, oxygen supplement positioning, tracheostomy suctioning and bagging. The only service needed by respondent and not already provided by the school to other students is the monitoring of his ventilator. *Id.* at 53a. Finally, the ALJ held that "even if federal law did not require school health care services for [respondent], state law does." *Id.* at 58a; see also *id.* at 54a-55a. Thus it ordered petitioner to reimburse respondent for health-care costs incurred for the 1993-1994 school year. *Id.* at 63a.

3. Petitioner filed suit in federal district court pursuant to 20 U.S.C. 1415(e)(4) and 28 U.S.C. 1367, challenging the ALJ's decision on both state and federal grounds. Pet. App. 9a. On cross-motions for summary judgment, the district court affirmed the ALJ's determination, "[i]n accordance with the appropriate standards, in light of *Tatro*, and for the reasons set forth in the ALJ's thorough decision." *Id.* at 15a. The court ruled that the needed services were not excluded "medical services" under IDEA, but instead required "related services." *Id.* at 11a-15a. The court did not address the state law issues. *Id.* at 15a.

4. The court of appeals affirmed. Pet. App. 1a-7a. After finding that the services respondent requires "qualify as supportive services necessary to enable him to enjoy the benefit of special education" and that such services need not be provided by a physician, it held that they are "related services" which petitioner is required to provide. *Id.* at 6a. It explained that *Tatro* "established a bright-line test: the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not." *Ibid.* While acknowledging that its reading of *Tatro* conflicts with that of other circuits, it "decline[d] to seize dicta in *Tatro* to go beyond the

physician/non-physician test which the Supreme Court sets forth therein." *Id.* at 7a.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, requires that States receiving federal special education funds provide special education and "related services" to students with disabilities. "[R]elated services" are defined to include supportive services that are required to assist a child with a disability to benefit from special education, but exclude "medical services" unless they are for diagnosis or evaluation. 20 U.S.C. 1401(a)(17). The Secretary of Education properly interprets the term "medical services" in this context to mean only services provided by a physician, and not school health services that can be provided by a non-physician. That interpretation is supported by the plain language of the statute.

The Secretary of Education is authorized by Congress to issue regulations as necessary to carry out the requirements of IDEA, and his interpretation of the statutory term is entitled to administrative deference for that reason. Moreover, that interpretation is additionally entitled to respect because Congress ratified it when, in 1982, Congress opposed the then-Secretary's attempt to expand the medical services exclusion and to restrict the related services provision. And, in 1983, Congress enacted Section 6 of the Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, 97 Stat. 1357, 1359 (codified as amended, 20 U.S.C. 1407(b)), which prohibits the Secretary from implementing any regulation that would lessen the protections afforded children with disabilities under IDEA, as embodied in the Secretary's regulations then in effect, unless such new regulation reflects the clear and unequivocal intent of Congress in legislation. Thus, petitioner's attempt to construe the "medical services" exclusion to depend on factors such as cost is, in

essence, an effort to obtain through the courts what Congress rejected.

Petitioner's arguments concerning the financial burden it claims would be imposed by affirmance of the court of appeals' judgment ignore the steps Congress has taken to ensure that other federal and state sources assist local school districts to pay the costs of related services for many students.

ARGUMENT

THE SECRETARY OF EDUCATION'S REGULATION CORRECTLY INTERPRETS THE "MEDICAL SERVICES" EXCLUDED FROM COVERAGE UNDER IDEA TO BE SERVICES THAT MUST BE PROVIDED BY A PHYSICIAN

A. The Plain Language Of IDEA Shows That Excluded "Medical Services" Are Services Provided By A Physician And Not Health Services Provided By Non-Physicians

1. The central purpose of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, is to ensure that children with disabilities have available to them a "free appropriate public education" (FAPE) which includes "special education and related services designed to meet their unique needs." 20 U.S.C. 1400(c).[6] In order to qualify

[6] The statute originally was entitled the Education of the Handicapped Act (EHA), Pub. L. No. 91-230, 84 Stat. 175 (1970), and has since been amended on numerous occasions, including when Congress enacted the Education for All Handicapped Children Act of 1975 (EAHCA) to amend the EHA in significant respects, and to define, for the first time, the terms "special education" and "related services." Pub. L. No. 94-142, 89 Stat. 773, 775. In 1990, Congress changed the title of the statute to the Individuals with Disabilities Education Act (IDEA). Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a)(1) and (3), 104 Stat. 1103, 1141, 1142 (1990 Amendments). Most recently, Congress reauthorized and amended IDEA on June 4, 1997. See Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997 Amendments). For a more detailed history of the statute's early evolution, see *Rowley*, 458 U.S. at 179-180.

for assistance under IDEA, a State must demonstrate to the Secretary of Education (Secretary), *inter alia*, that it has in effect "a policy that assures all children with disabilities the right to a free appropriate public education," 20 U.S.C. 1412(1), and "procedures to assure that, to the maximum extent appropriate, children with disabilities, * * * are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," 20 U.S.C. 1412(5)(B).

Congress defined FAPE to mean "special education and related services" that meet certain standards and are "provided at public expense, under public supervision and direction, and without charge." 20 U.S.C. 1401(a)(18). "[S]pecial education" is defined as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability," including instruction in classrooms, the home, hospitals and other settings. 20 U.S.C. 1401(a)(16). "[R]elated services" are:

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identi-

fication and assessment of disabling conditions in children.

20 U.S.C. 1401(a)(17).[7]

The term "related services" is not limited to the services enumerated in the statute as "other supportive services," as is plain from the fact that Congress introduced that list by use of the term "including." See *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 n.9 (1985); *American Surety Co.* v. *Marotta*, 287 U.S. 513, 517 (1933). On its face, the statute requires States to provide as "related services" all services "as may be required to assist a child with a disability to benefit from special education," with the single exception of nondiagnostic and nonevaluative medical services. 20 U.S.C. 1401(a)(17).

It is undisputed that the services at issue in this case are required to assist respondent to benefit from his special education program. The services "fall squarely within the definition of a 'supportive service'" for the same reason that catheterization did in *Irving Independent School District* v. *Tatro*, 468 U.S. 883 (1984): because without the services respondent "cannot attend school and thereby 'benefit from special education.'" 468 U.S. at 890; Pet. App. 59a ("If the District refuses to provide health care and the family can't provide it," the "only apparent alternative is a homebound program."); Tr. 87, 637-638, 661. As the *Tatro* Court explained, "[s]ervices * * * that permit a child to remain at

[7] The statutory provisions at issue in this case have been altered only slightly during the course of the various statutory amendments described in note 6, *supra*. See, *e.g.*, 1990 Amendments, § 101(c), 104 Stat. 1103 (adding "therapeutic recreation," "social work services," and "rehabilitation counseling" as examples of supportive services that are included under the "related services" definition); 1997 Amendments, § 101, 111 Stat. 45 (adding "orientation and mobility" to the listed examples of supportive services). Unless otherwise noted, we cite to the 1994 codified version of IDEA in effect before the 1997 amendments and during the year for which respondent sought payment from petitioner for the challenged services.

school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school," all of which are required by IDEA. 468 U.S. at 891.

2. Petitioner contends that the services respondent requires are not "related services" under IDEA because they fall within the exception carved out by Congress for "medical services." In defining "related services" Congress listed, as an example, "medical services, except that such medical services shall be for diagnostic and evaluation purposes only." 20 U.S.C. 1401(a)(17). It is undisputed that the services at issue here are not for diagnosis or evaluation. Therefore, if they are "medical services," they are not "related services" under IDEA.

Congress did not define the term "medical services" in IDEA. Thus, we start with the "'ordinary, contemporary, common meaning.'" *Walters* v. *Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997). The adjective "medical" is commonly understood to mean "of, relating to, or concerned with physicians or with the practice of medicine often as distinguished from surgery." *Webster's Third International Dictionary* 1402 (1986). For example, a person who goes to "medical school" is understood to be training to be a physician. In most States, the "Medical Practice Act" regulates physicians and generally bars anyone but physicians from "practicing medicine." See generally Federation of State Medical Boards of the United States, *A Guide to the Essentials of a Modern Medical Practice Act* (1985), *reprinted in Medical Malpractice: Hearings Before the Subcomm. on Health & the Env't of the House Comm. on Energy & Commerce*, 99th Cong., 2d Sess. 393-421 (1986). Iowa, for example, has a "Board of Medical Examiners" to license and regulate physicians, and a "Board of Nursing" to license and regulate nurses. See Iowa Code Ann. 148.1-148.13, 152.1-152.12 (West 1997).

Petitioner suggests (Br. 14-15, 34) that the statutory language should be interpreted not according to its plain meaning but instead according to a five-factor test; in determining whether services are "medical," courts should consider whether they are complex, continuous, outside the capabilities of existing school health personnel, expensive, or likely to have serious repercussions when improperly performed. That five-factor test finds no support in the statutory language. Moreover, each of the factors is contradicted by the examples of "related services" contained in the statute, or otherwise indisputably included among the services that schools must provide.

Many of the "related services" expressly listed in the statute, including "psychological services" and "physical and occupational therapy," may vary widely in complexity depending on the needs of the student receiving the services. 20 U.S.C. 1401(a)(17). Yet the statute is correctly interpreted to require provision of those services regardless of complexity otherwise the "cardinal principle of statutory construction" would be violated by not giving effect to every word of the statute. *Bennett* v. *Spear*, 117 S. Ct. 1154, 1166 (1997); *United Food and Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 517 U.S. 544, 550 (1996).

So too, numerous continuous services are indisputably required by IDEA. Congress heard testimony about the provision of continuous services to children with various disabilities during the legislative proceedings surrounding enactment of the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (EAHCA), which defined "related services" for the first time.[8] Indeed, petitioner does not contest (Br. 5, 6-7, 19) that IDEA requires it to provide a full-time one-on-one associate to help respondent move about the building, turn pages, and manipulate other materials. Exh. 91 at 364; Pet. App. 27a; see also Tr. 546.

[8] See 121 Cong. Rec. 23,707 (1975) (statement of Rep. Quie) (readers for blind children); *Financial Assistance for Improved Educational Services for Handicapped Children: Hearings Before the Select Subcomm. on Educ. of the House Comm. on Educ. & Labor*, 93d Cong., 2d Sess. 261 (1974) (ratio of one-to-one may be required for most severely handicapped); *Education for All Handicapped Children, 1973-1974: Hearings on S. 6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Public Welfare*, 93d Cong., 1st Sess., Pt. 1 at 1467 (1973) (one to one relationship required in some instances).

Persons other than existing school health personnel are often needed to provide many of the related services expressly listed in the statute including "speech pathology and audiology, psychological services, [and] physical and occupational therapy." 20 U.S.C. 1401(a)(17). As this Court recognized in *Tatro*, "Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as 'trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel.'" 468 U.S. at 893, quoting S. Rep. No. 168, 94th Cong., 1st Sess. 33 (1975).

Congress recognized that providing a free appropriate public education under IDEA would be costly. "There is no doubt that Congress has imposed a significant financial burden on States and school districts that participated in IDEA." *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 15 (1993). In enacting the EAHCA in 1975, Congress understood that, on average, special education and related services for a child with a disability cost two to three times more than a regular education. H.R. Rep. No. 332, 94th Cong., 1st Sess. 12 (1975). That ratio has remained constant over the ensuing 20 years. See S. Chaikind et al., *What Do We Know About the Costs of Special Education? A Selected Review*, 26 J. Spec. Educ. 344, 344-345 (1993).[9] The text and

[9] The costs of IDEA services should be viewed comparatively. If a child with a disability cannot receive the free appropriate public education he requires at school, then the school district will have to provide it in a home or an institutional setting. It thus could be necessary for school

history of the statute show that Congress addressed cost concerns through other provisions of IDEA, and not by excluding related services on the basis of cost. See pp. 24-30, *infra*.

Finally, services that can have catastrophic consequences when improperly performed are indisputably included among the related services required by IDEA. The statute expressly lists psychological services, which can, in the case of a suicidal child, have extremely serious consequences. And catheterization—the service held to be a non-medical related service in *Tatro*—can lead to death if improperly performed. See *Lee* v. *Andrews*, 545 S.W.2d 238 (Tex. Civ. App. 1976).

Thus, none of petitioner's "factors" was intended or understood by Congress to be a basis for excluding services from IDEA's "related services" requirement. Neither alone nor in combination can those factors transform a nonmedical "related service" into an excluded "medical service."

3. Petitioner attempts (Br. 20-21) to find in this Court's precedents a general principle that statutes enacted pursuant to Congress's power under the Spending Clause, U.S. Const., Art. I, § 8, Cl. 1, should be construed to minimize the costs imposed on States, citing, *inter alia*, *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), and *Gebser* v. *Lago Vista Indep. Sch.Dist.*, 118 S.Ct. 1989 (1998), but it is mistaken. There is nothing in those cases to suggest that, when it is clear that Congress intended to impose privately enforceable obligations on recipients of federal funds to provide special education and related services, the scope of those obligations should be determined by anything other than normal rules of statutory construction. *Tatro*, 468 U.S.

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districts to pay for a one-on-one teacher to teach the child in his home. In Iowa, such services are paid for by an area education agency rather than by the school district, Tr. 284, which may explain why petitioner does not discuss them.

at 891 n.8; *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 665-666 (1985); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987). In any event, IDEA was enacted not only pursuant to Congress's authority under the Spending Clause, but also pursuant to Section 5 of the Fourteenth Amendment. See 20 U.S.C. 1400(b)(9) (Congress declaring intent in enacting EAHCA to "assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law"); *Smith* v. *Robinson*, 468 U.S. 992, 1013 (1984) (holding that IDEA precludes claim based on Equal Protection Clause because Congress intended IDEA to be the exclusive "vehicle for protecting the constitutional right of a handicapped child to a public education"); *Rowley*, 458 U.S. at 180 n.2., 192-200.

Moreover, two principles of statutory construction point in the opposite direction from petitioner's proposed approach: first, the canon that exceptions should be narrowly construed, see *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 731-732 (1995); *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993); and second, the principle that statutes, including those creating federal programs under the Spending Clause, are to be construed with deference to the regulations of the administering agency, see, *e.g.*, *Regions Hosp.* v. *Shalala*, 118 S. Ct. 909, 915 (1998); *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 414-420 (1993); *Rust* v. *Sullivan*, 500 U.S. 173, 184-190 (1991).

B. The Secretary Of Education's Interpretation Of The "Medical Services" Exclusion Is Reasonable, Longstanding, And Entitled To Deference

1. Congress delegated substantial authority to the Secretary under IDEA, including the power to review state plans, 20 U.S.C. 1413(c), to disburse federal funds, 20 U.S.C. 1420, and to withhold federal funds if there is a failure to comply with statutory requirements, 20 U.S.C. 1416(a). Congress

also entrusted the Secretary with the authority to issue "such rules and regulations as may be necessary," to carry out the requirements of IDEA. 20 U.S.C. 1417(b). The Secretary's regulations are "entitled to 'legislative effect,' and [are] controlling 'unless [they are] arbitrary, capricious, or manifestly contrary to the statute.'" *Atkins* v. *Rivera*, 477 U.S. 154, 162 (1986) (citations omitted); see *Tatro*, 468 U.S. at 891-892 (deferring to Secretary's IDEA regulations); *Honig* v. *Doe*, 484 U.S. 305, 325 n.8 (1988) (same); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Deference to the Secretary's interpretation of his own regulation is particularly appropriate here because of the longstanding nature of his interpretation. See *Zenith Radio Corp.* v. *United States*, 473 U.S. 433, 450 (1978); see also *Auer* v. *Robbins*, 117 S. Ct. 905, 911 (1997); *Honig*, 484 U.S. at 325 n.8 (deferring to Department of Education policy letter).

2. The "related services" regulation at issue here was initially promulgated in its current form in 1977, 42 Fed. Reg. 42,479 (1977) (codified at 45 C.F.R. 121a.13 (1978)), and is currently found at 34 C.F.R. 300.16. Throughout the intervening 20 years, the regulation has specified that "related services" include, *inter alia*, "school health services," which it defines as "services provided by a qualified school nurse or other qualified person." 34 C.F.R. 300.16(a) and (b)(11).[10] The regulation also has provided that "related services" include "medical services for diagnostic or evaluation purposes," and that "medical services," as used in the related services regulation, are those "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. 300.16(a) and (b)(4). Read together, those definitions establish that services provided by physicians, known as "medical services," are to be treated differently from all other health-related services that are necessary to assist a child with a disability to benefit from special education. Services provided by physicians are excluded unless they are diagnostic or evaluative, while services that can be provided by other qualified health personnel are "related services" so long as they are necessary to assist a child with a disability to benefit from special education.

[10] A "qualified" person is "a person [who] has met [state educational agency] approved or recognized certification, licensing, registration, or other comparable requirements that apply to the area in which he or she is providing special education or related services." 34 C.F.R. 300.15. The licensing requirements for performance of various tasks by non-physicians may vary from State to State but, as petitioner concedes (Pet. Br. 36), these requirements do not affect a student's entitlement to provision of related services under IDEA. See also Br. of Amici Curiae National Ass'n of Protection and Advocacy Systems et al. 23, n.14.

In *Tatro*, this Court so construed the Secretary's regulation (then codified at 34 C.F.R. 300.13(b)(4)(1983)). The Court concluded that, because the regulation defines the "medical services" that are owed under IDEA as services provided by licensed physicians for purposes of diagnosis or evaluation, "[p]resumably this means that 'medical services' *not* owed under the statute are those 'services by a licensed physician' that serve other purposes." 468 U.S. at 892 n.10. That presumption derives from the common-sense principle that a single term—"medical services"—normally has a single meaning in determining both what is included and what is excluded under a single statutory provision.

3. The Secretary has consistently read his regulations in that manner. Following initial promulgation of the regulation (and before *Tatro*), the Secretary's representatives expressly repeated, in policy letters responding to inquiries about the provision of psychotherapy, the principle that coverage under the statute depends on whether a service is provided by a physician. The Secretary explained that "[i]f psychotherapy is interpreted in your State as a medical service (i.e. administered by a licensed physician), this service would not be required." Letter to Minsky, Educ. Handi-

cap. L. Rep. 211:19, 20 (Apr. 7, 1978); accord Letter to Janda, Educ. Handicap. L. Rep. 211:205, 206 (Jan. 25, 1979). On the other hand, "in some States (and with certain professional disciplines) 'psychotherapy' might be provided by someone other than a psychiatrist (*e.g.*, a psychiatric social worker, etc.). In such cases, the provision of psychotherapy by someone other than a psychiatrist could be considered to be an appropriate related service under the regulations—if the service is needed to assist a handicapped child to benefit from special education." Letter to Millman, Educ. Handicap. L. Rep. 211:104, 105 (June 5, 1979).[11]

Petitioner errs in contending (Br. 25-27) that the above-cited letters and other policy letters by the Secretary's delegates do not apply a bright-line distinction between services provided by a physician and services provided by non-physicians. Petitioner (Br. 25-27) and its amicus (Br. of Amici Curiae National Ass'n of Protection and Advocacy Systems et al. 14 (NSBA Br.) specifically focus on a February 22, 1996, policy letter (Letter to Anderson, 24 Ind. Disab. Educ. L. Rep. 180, *reprinted at* Pet. App. 64a-67a), to contend that the Secretary "renounced" the bright-line test. See also *Morton Community Unit Sch. Dist. No. 709* v. *J.M.*, No. 97-3962, 1998 WL 420393 (7th Cir. July 27, 1998) (criticizing letter as evasive and noncommittal).

The February 22, 1996, letter was a response to a general inquiry whether the Secretary considers "one-to-one nursing services necessary for a student with disabilities to attend a public school setting" to be "a required related service or a medical service as determined by several recent court decisions?" 24 Ind. Disab. Educ. L. Rep. at 180. Because the question specifically referenced court decisions, the letter cited the various court decisions and acknowledged that courts have reached differing conclusions, and have based their analysis on various factors. *Ibid.* The letter clearly attributes that analysis to courts and does not, contrary to petitioner's claim (Br. 27), endorse it as the policy of the Department of Education. See also Letter to Anonymous, 25 Ind. Disab. Educ. L. Rep. 531, 532 (Nov. 13, 1996)(cited at Pet. Br. 27) (discussing distinction as one made by courts, not by the Department of Education).

The February 22, 1996, letter further notes that the question posed "could arise in a variety of factual contexts," and that the Secretary cannot "express a view as to whether or not 'one-to-one nursing' services are a required related service for an individual disabled student," because "the determination as to whether these services are required related services for an individual disabled student must be made on a case-by-case basis * * * by the participants on the student's IEP team." 24 Ind. Disab. Educ. L. Rep. at 180. The letter then unequivocally states that, "[i]f the student's IEP team determines that nursing services are a required related service for a particular student, those services must be provided at no cost to the parents." *Ibid.* Thus, that letter reaffirmed the Secretary's longstanding interpretation of IDEA that services provided by a nurse are not excluded medical services.

The case-by-case analysis required by the Secretary's policy letters is not, as petitioner contends (Br. 27), a rejection of the bright-line physician/non-physician rule. Rather, it is the three-prong test that the Secretary derived from

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[11] See also Letter to Jacobs, Educ. Handicap. L. Rep. 211:54 (Aug. 14, 1978) (explaining that an optometrist, *i.e.*, a non-physician, may provide "diagnostic services" with IDEA funds, just as an audiologist may, but specifying that he is not qualified to provide "medical diagnostic services, because (among other things) they do not meet the definition of 'medical services' * * * (i.e. 'medical services' means services provided by a licensed physician").

Tatro to be applied on a case-by-case basis to determine whether a health service must be provided:

> First, in order to be entitled to receive the service, the child must be handicapped * * * Second, the service must be necessary to aid a handicapped child to benefit from special education. If the treatment or medication could be given during non-school hours, then the school district is not required to provide the service, even if the burden would be minimal. Third, the service need only be provided if it can be provided by a nurse or other qualified person, not a physician.

Letter to Del Polito, Educ. Handicap. L. Rep. 211:392, 393 (June 24, 1986); Letter to Greer, 19 Ind. Disab. Educ. L. Rep. 348, 349 (July 14, 1992) (same); Letter to Johnson, 20 Ind. Disab. Educ. L. Rep. 174, 175 (Apr. 20, 1993) (same); 25 Ind. Disab. Educ. L. Rep. at 532 (same).

4. The courts that have adopted some type of balancing test based on the nature of the service and the economic burden it would place on a school district apparently view the Secretary's regulation to be an imperfect measure of the policies underlying the statutory "medical services" exclusion. See, *e.g.*, *Detsel* v. *Board of Educ. of Auburn*, 637 F. Supp. 1022 (N.D.N.Y. 1986), aff'd, 820 F.2d 587 (2d Cir.) (per curiam), cert. denied, 484 U.S. 981 (1987). Such an approach misconceives the proper relationship between the courts and the Secretary's delegated authority to issue regulations necessary to carry out the requirements of IDEA. 20 U.S.C. 1417(b). The Court explained in *Tatro* that the Secretary could have reasonably selected his definition of "medical services" in an attempt to spare school districts from unduly expensive services, reasoning that services provided by physicians were, on average, more expensive than other health services. See 468 U.S. at 892-893.

The Secretary's regulation reflects a reasonable determination that a bright-line rule regarding the meaning of

"medical services" will serve the policies of the statute better than a multi-factored test requiring individualized determinations in each case. See *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 600-601 (1981); *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 48-50 (1981); *Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356, 371-374 (1973). The regulation eliminates the costs and confusion that would result from a multi-factored test that would require adjudication of varied factual circumstances through the extensive appellate processes provided under the Act. See *Gray Panthers*, 453 U.S. at 48; *Weinberger* v. *Salfi*, 422 U.S. 749, 782-785 (1975); *American Hosp. Ass'n* v. *NLRB*, 899 F.2d 651, 659 (7th Cir. 1990) (Posner, J.) ("A rule makes one or a few of a mass of particulars legally decisive, ignoring the rest. The result is a gain in certainty, predictability, celerity, and economy, and a loss in individualized justice. Often the tradeoff is worthwhile; at least the prevalence of rules in our legal system so suggests."), aff'd, 499 U.S. 606 (1991).

C. Congress Has Ratified The Secretary's Interpretation Of "Related Services" And The "Medical Services" Exclusion In IDEA

After the statute had been interpreted to require States to provide school health services as "related services," and to exclude only physician-provided services as "medical services," Congress ratified that interpretation in the Education of the Handicapped Act Amendments of 1983, § 6, Pub. L. No. 98-199, 97 Stat. 1357, 1359.

On August 4, 1982, the then-Secretary of Education had issued proposed regulations that would have changed various regulations governing assistance to States for the education of handicapped children. 47 Fed. Reg. 33,836-33,860 (1982). One of his proposals was to narrow the "related services" regulation. The proposal was motivated by concerns about cost. The Secretary stated, in language similar to that of petitioner's amicus (NSBA Br. 24-28), that "[s]chools face

increasing costs in providing related services as health agencies and insurers which formerly paid them shift this responsibility * * * Many school officials have expressed their belief that some limitations must be placed on their responsibility for providing related services in light of their agencies' limited funds." 47 Fed. Reg. at 33,827-33,838.

The proposed regulations would have eliminated "school health services" from the definition of "related services"; they would have changed the meaning of excluded "medical services" from "services provided by a licensed physician" to "services relating to the practice of medicine"; and they would have allowed school districts to place "reasonable limitations" on provision of related services, based *inter alia* on the "level, frequency, location, and duration of the services" and the qualifications of the service providers. 47 Fed. Reg. at 33,838. Illustrations of services that were meant to be excluded by the changes included "[l]ife-sustaining procedures that * * * [m]ust be administered by specially trained, licensed health care professionals; or * * * [e]ntail a significant risk of illness or more than minimal injury to the child." *Id.* at 33,846.

In the course of explaining the proposed changes, the Secretary unequivocally confirmed the Department of Education's longstanding interpretation of the current statute and regulation to rest on a bright-line distinction between services provided by a physician and those provided by non-physicians: "[t]he statute defines related services to exclude medical services except where they are for diagnostic or evaluation purposes. The existing regulations define medical services as services provided by a licensed physician." 47 Fed. Reg. at 33,838.

Members of Congress criticized the proposed regulations, and specifically targeted a few of the proposed changes, including the amendment to the "related services" regulation. See 128 Cong. Rec. 20,620 (1982) (statement of Rep. Biaggi); *id.* at 21,793 (statement of Rep. Bonker); see also H.R. Rep.

No. 906, 97th Cong., 2d Sess. 4-5 (1982). On September 8, 1982, Congress enacted Section 305(b) of the Supplemental Appropriations Act, 1982, Pub. L. No. 97-257, 96 Stat. 818, 874, expressing the sense of Congress that the proposed regulations should not become effective and should not be transmitted to Congress while it was not in session.

On November 3, 1982, the Secretary withdrew six of the most controversial changes, including the proposal to narrow the "related services" regulation. See 47 Fed. Reg. 49,871-49,872 (1982); *Oversight Hearings on Proposed Changes in Regulations for the Education for All Handicapped Children Act: Before the Subcomm. on Select Educ. of the House Comm. on Educ. & Labor*, 97th Cong., 2d Sess. 122, 126-127, 175 (1982).

The following year, Congress added a new Section 608 to the Education of the Handicapped Act, which states that the Secretary

> may not implement * * * any regulation prescribed pursuant to this chapter which would procedurally or substantively lessen the protections provided to handicapped children under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to * * * related services * * *), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation.

Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, § 6, 97 Stat. 1357, 1359 (codified as amended, 20 U.S.C. 1407(b)). That provision was enacted in direct response to the proposed, then withdrawn, 1982 regulatory changes. See 129 Cong. Rec. 33,316 (1983) (statement of Rep. Biaggi) (explaining that provision was reaction to Secretary's 1982 proposals); see also H.R. Rep. No. 410, 98th Cong., 1st Sess. 21 (1983).

Thus, Section 608 constitutes a ratification of the Secretary's "related services" regulation, which includes school health services and excludes as medical services only services provided by a physician. It also reflects congressional disapproval of a multi-factor determination of "medical services" that would expand the exclusion to take into account the extent or nature of the services by excluding services provided by any "specially trained, licensed health care professionals" or services that involve "a significant risk of illness or more than minimal injury to the child." 47 Fed. Reg. at 33,846. "Where, as here, 'Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation,' we cannot but deem that construction virtually conclusive." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986). Hence, in asking this Court to construe the "medical services" exclusion to depend on factors such as cost, petitioner is, in essence, attempting to obtain through the courts what Congress rejected.

D. Petitioner's Cost-Based Arguments To Expand IDEA's "Medical Services" Exclusion Are Not Supported By The Statutory Structure And Are Inconsistent With The Intent Of Congress.

Petitioner and its amicus devote significant portions of their briefs to describing the fiscal burden they claim they would be required to shoulder should the court of appeals' judgment be affirmed. In doing so, they ignore steps Congress has taken to ensure that costs of "related services" for many disabled students are borne by other agencies.

Congress has provided States with tools to ensure that local educational districts are not unfairly burdened with health care costs. In 1975, when the predecessor to IDEA was enacted, the Senate Committee Report on EAHCA explained that, while Congress "has provided that the State education agency is to be the final responsible authority for

assuring that all handicapped children have available to them free appropriate public education, it does not intend that State and local educational agencies must be the sole providers of such services." S. Rep. No. 168, 94th Cong., 1st. Sess. 22 (1975).

In 1986, Congress took steps to facilitate the payment of expenses by sources other than educational agencies. Section 203 of the Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145, 1158-1159, entitled "Sharing of Costs of Free Appropriate Public Education," declared that, although the statute provides that state educational agencies bear the responsibility for ensuring that IDEA's requirements are carried out, that provision "shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State." §203, 100 Stat. 1159 (codified as amended, 20 U.S.C. 1412(6)). Section 203 also required that States

> set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to—(A) define the financial responsibility of each agency for providing handicapped children and youth with free appropriate public education, and (B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of the agreement.

§ 203, 100 Stat. 1159 (codified as amended, 20 U.S.C. 1413(a)(13)). In particular, Congress contemplated that child welfare funds and Medicaid would absorb part of the costs. Section 203 specified that the statute "shall not be construed to permit a State to reduce medical and other assistance

available or to alter eligibility under titles V [Maternal and Child Health Services Block Grant] and XIX [Medicaid] of the Social Security Act [42 U.S.C. 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education." § 203, 100 Stat. 1159 (codified at 20 U.S.C. 1413(e)).[12]

Section 203 was enacted in response to the General Accounting Office's (GAO) report in 1986 that some States had successfully established interagency agreements that recovered for school districts the costs of related services required by IDEA from Medicaid[13] and private insurers.[14] See H.R. Rep. No. 860, 99th Cong., 2d Sess. 21 (1986).

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[12] Medicaid is a jointly funded federal-state program that provides health insurance to people, *inter alia*, who receive Aid to Families with Dependent Children or are disabled for purposes of the federal Supplemental Security Income program. See 42 U.S.C. 1396-1396v. Approximately 27% of all children with disabilities ages 1 to 17 receive Medicaid, and a significant additional number are eligible but unserved. See Nat'l Inst. on Disability and Rehabilitation Research, *Disability Statistics Reports: Medical Expenditures for People with Disabilities in the United States, 1987* 33, 34 (1996). Under Medicaid, each State is required to provide Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services for children under 21, which include any services covered by the federal Medicaid program, mandatory or optional, that are necessary to treat conditions identified through screening. Such services could include home health care, private duty nursing, or personal care services, see 42 U.S.C. 1396d(r) (incorporating services in 1396d(a)), all of which can include school health services. See *Skubel* v. *Fuoroli*, 113 F.3d 330 (2d Cir. 1997); *Detsel* v. *Sullivan*, 895 F.2d 58 (2d Cir. 1990). See generally Health Care Financing Admin., U.S. Dep't of Health & Human Servs., *Medicaid and School Health: A Technical Assistance Guide* (Aug. 1997).

Respondent apparently is not currently income-eligible for Medicaid because the monetary fund established as a settlement of liability for his injury has not yet been exhausted. Tr. 598.

[13] The GAO report noted that Connecticut had estimated that the State's school districts could recover approximately $5-6 million per year from Medicaid alone. U.S. Gen. Accounting Office, *Special Education: Financing Health and Educational Services for Handicapped Children* 12 (July 1986).

[14] While the scope of coverage varies considerably, many employers offer insurance plans that cover nursing and health aide services (although with co-payments and other limitations) for their employees' dependents. See 1 Task Force on Technology-Dependent Children, U.S. Dep't of Health & Human Servs., *Fostering Home and Community-Based Care for Technology-Dependent Children*, 136, 143-144 (Apr. 7, 1988). School districts may recover costs from the child's insurance, so long as there is no "financial loss" to the child or his family. See 45 Fed. Reg. 86,390 (1980); *Shook* v. *Gaston County Bd. of Educ.*, 882 F.2d 119 (4th Cir. 1989).

In 1988, Congress took further action to facilitate the use of Medicaid funds for payment of services included in a student's IEP under IDEA. Section 411(k)(13) of the Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 360, 102 Stat. 683, 798, specified that nothing in the Medicaid statute should "be construed as prohibiting or restricting," payments "for medical assistance for covered services furnished to a child with a disability because such services are included in the child's" IEP under IDEA. 102 Stat. 798 (codified at 42 U.S.C. 1396b(c)). Contrary to petitioner's contention (Pet. Br. 17), Congress did not thereby indicate that the medical assistance paid for by Medicaid would be for services not covered by IDEA. The assumption underlying that legislation was that some services qualify both as related services in IEPs and as services covered by Medicaid, and not that those categories are mutually exclusive as petitioner suggests. The legislative history explained:

> Federal Medicaid matching funds are available for the cost of health services, covered under a State's Medicaid plan, that are furnished to a handicapped child * * *, even though such services are included in the child's individualized education program * * * While the State education agencies are financially responsible for educational services, in the case of Medicaid-eligible handicapped child, State Medicaid agencies remain responsible for the 'related services' indentified [sic] in the child's IEP if they are covered under the State's Medicaid plan.

H.R. Rep. No. 661, 100th Cong., 2d Sess. 268-269 (1988).

Despite those legislative amendments, by 1990 over half the States were still not using interagency agreements. See A. Katsiyannis, *Provision of Related Services: State Practices and the Issue of Eligibility Criteria*, 24 J. Spec. Educ. 246, 249 (1990). A more recent report, based on results of a national survey of state special education finance systems, noted that, as of 1994-1995, "all but one of 42 reporting states used Medicaid as another source of special education revenue," and "[o]ver a quarter of the states reported that they used state mental health funds" or "private medical insurance" as sources of special education revenue. See T. B. Parrish et al., Center for Spec. Educ. Fin., *State Special Education Finance Systems, 1994-95*, at 29 (June 1997). Nonetheless, the report found that "[f]unding sources like Medicaid clearly have the potential to offset a greater share of special education costs," but are still being underutilized or underreported. *Id.* at 32.

In 1997, Congress strengthened the coordination provisions in IDEA to provide that the State "shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect" and that the agreements must be in writing. 1997 Amendments, § 612(a)(12)(A) and (C), 111 Stat. 64-65, 66. Such agreements must provide that the "financial responsibility of each public agency * * * , including the State Medicaid agency and other public insurers of children with disabilities, shall *precede* the financial responsibility of the local educational agency." *Id.* at § 612(a)(12)(A)(i) and (B)(ii), 111 Stat. 65, 66 (emphasis added). That subsection was "to reinforce two important principles: (1) that the State agency or [local educational agency] responsible for developing a child's IEP can look to non-educational agencies, such as Medicaid, to pay for or provide those services they (the non-educational agencies) are otherwise responsible for; and (2) that the State agency or [local educational agency] remains responsible for ensuring that children receive all the services described in

their IEPs in a timely fashion, regardless of whether another agency will ultimately pay for the services." H.R. Rep. No. 95, 105th Cong., 1st Sess. 92 (1997); S. Rep. No. 17, 105th Cong., 1st Sess. 12 (1997).[15]

In addition to Medicaid, other federal and state programs are also available to pay for related services required by children with disabilities to benefit from special education in the regular classroom. For example, the Maternal and Child Health Block Grant program, 42 U.S.C. 701 *et seq.*, provides States with funds to provide direct services to children with special heath care needs. See Office of Technology Assessment, U.S. Congress, *Technology-Dependent Children: Hospital v. Home Care: A Technical Memorandum* 70-71 (May 1987). The Balanced Budget Act of 1997 created the State Children's Health Insurance Program (CHIP), which will provide $48 billion over the next ten years for States to provide health services to low-income children who do not have health insurance and are not eligible for Medicaid. See Pub. L. No. 105-33, Tit. IV, 111 Stat. 251, 552 (to be codified at 42 U.S.C. 1397 *et seq.*); see also Nat'l Inst. on Disability and Rehabilitation Research, *Disability Statistics Reports: Medical Expenditures for People with Disabilities in the United States, 1987*, at 32, 34 (1996) (7% of children with disabilities had no insurance and were not covered by Medicaid or any other government program).

Moreover, the size of the financial burden that is placed on petitioner and other local school districts depends in large

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[15] See also 143 Cong. Rec. S4300 (daily ed. May 12, 1997) (statement of Sen. Harkin) ("[I]n States that have voluntarily provided interagency supports, cost savings to [local education agencies] have been significant. For instance, the Chicago public schools receive[] $40 million in support for medically related services for students with disabilities, which has enabled the district to contain costs for related services and increased the access of poor children with disabilities to comprehensive health care services."); *id.* at S4373 (daily ed. May 13, 1997) (statement of Sen. Murray); *id.* at S4407 (daily ed. May 14, 1997) (statement of Sen. Grassley).

part on their State's choice of a special education financing system. IDEA places the ultimate responsibility on state educational agencies to ensure that IDEA's requirements are carried out, and IDEA does not dictate how States structure their funding of special education and related services. Different States have adopted a variety of financing systems that spread the costs in different ways. See Parrish, *supra*. Of particular significance here, States are increasingly making special provisions for exceptionally high-cost students in their financing systems. *Id.* at 52. For example, under Vermont's special education funding program, if a local district spends in excess of three times the base amount per pupil on a single student with a disability, the State provides an "extraordinary services reimbursement" that reimburses the district for 90% of the excess expenditures. Vermont also provides "intensive services reimbursment," based on a district's ability to pay, for expenditures not covered by federal funds, the state and locally funded block grant, and the extraordinary cost allocation. *Id.* at 90; see also D. L. Montgomery, Am. Insts. for Research, *State Analysis Series, A Profile of Special Education Finance Reform in Vermont* (Mar. 1995). Thus, States have the flexibility to alter their financing systems to control the size of the financial burden placed on any particular local educational agency by the provision of related services.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1998

APPENDIX

1. The Individuals with Disabilities Education Act, as codified in 1994 at 20 U.S.C. 1400 *et seq.*, provided in relevant part:

§ 1400. Congressional statements and declarations

* * * * *

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

§ 1401. Definitions

(a) As used in this chapter—

* * * * *

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(18) The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

* * * * *

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include—

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency reponsibilities [sic] or linkages (or both) before the student leaves the school setting,

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

* * * * *

§ 1407. Regulation requirements

* * * * *

(b) Lessening of procedural or substantive protections as in effect on July 20, 1983, prohibited

The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this chapter which would procedurally or substantively lessen the protections provided to children with disabilities under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines [sic], attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation.

* * * * *

§ 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

* * * * *

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, * * *.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency and shall meet

education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided children with disabilities in the State.

* * * * *

§ 1413. State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall—

* * * * *

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to—

(A) define the financial responsibility of each agency for providing children and youth with disabilities with free appropriate public education, and

(B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to

secure reimbursement from other agencies or otherwise implement the provisions of the agreement;

* * * * *

(e) Prohibition on reduction of assistance

This chapter shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act [42 U.S.C. 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education for children with disabilities within the State

* * * * *

§ 1417. Administration

* * * * *

(b) Rules and regulations

In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

2. 34 C.F.R. 300.16 provides in relevant part:

§ 300.16 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

* * * * *

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

* * * * *

(11) "School health services" means services provided by a qualified school nurse or other qualified person.

* * * * *

No. 97-1793

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,
Petitioner,
v.
GARRET F., A MINOR BY HIS MOTHER AND NEXT FRIEND, CHARLENE F.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, AMERICAN MUSIC THERAPY ASSOCIATION, ARC OF THE UNITED STATES, BRAIN INJURY ASSOCIATION, INC., CENTER FOR LAW AND EDUCATION, CHILDREN AND ADULTS WITH ATTENTION DEFICIT DISORDERS, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., HIGHER EDUCATION CONSORTIUM FOR SPECIAL EDUCATION, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, NATIONAL ASSISTIVE TECHNOLOGY ADVOCACY PROJECT, NATIONAL PARENT NETWORK ON DISABILITIES, AND TASH, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Are the health services required by Garret F. "related services" within the meaning of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1793

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,
Petitioner,

v.

GARRET F., A MINOR BY HIS MOTHER AND NEXT FRIEND, CHARLENE F.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, *ET AL.*, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE* [1]

Amici curiae National Association of Protection and Advocacy Systems (NAPAS), American Music Therapy Association (AMTA), Arc of the United States, Brain Injury Association, Inc. (BIA), Center for Law and Education, Children and Adults with Attention Deficit

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[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief, and letters of consent have been filed with the Clerk of the Court.

Disorders (CH.A.D.D.), Disability Rights Education and Defense Fund, Inc. (DREDF), Higher Education Consortium for Special Education (HECSE), Judge David L. Bazelon Center for Mental Health Law, the National Assistive Technology Advocacy Project, National Parent Network on Disabilities (NPND), and TASH are organizations that advocate for the rights and interests of persons with disabilities, including the rights of students under the IDEA.

NAPAS is a membership organization for the nationwide system of protection and advocacy (P&A) agencies. P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. Approximately 39% of the cases handled by the protection and advocacy agencies in 1997 were special education cases or cases that included special education issues. NAPAS provides training and technical assistance to the P&A network, and has participated as *amicus curiae* in a number of cases before this Court, including *Florence County Sch. Dist. No. 4 v. Carter*, 510 U.S. 7 (1993) and *Honig v. Doe*, 484 U.S. 305 (1988).

AMTA is a nonprofit organization committed to increasing public awareness of the benefits of music therapy and to increasing access to quality music therapy services throughout the United States. AMTA provides technical assistance necessary to make music therapy accessible and available to both children and adults with disabilities. AMTA assists parents in advocating for their children to receive music therapy services as a component of a free appropriate public education and recognizes the obstacles faced by parents in obtaining music therapy and other related services that will enable their children to benefit from special education.

The Arc of the United States, a national organization on mental retardation, is an open membership organization made up of people with mental retardation and their

families, friends, interested citizens, and professionals in the disability field. With 140,000 members in 1,100 state and local chapters nationwide, the Arc is the largest voluntary organization devoted solely to working on behalf of the estimated seven million people with mental retardation in the United States and their families. Children with mental retardation historically have faced discrimination by our nation's public schools. The Arc has played a significant role over the last three decades in securing the right to a free, appropriate public education for all students with mental retardation and other disabilities.

BIA is a national, non-profit organization dedicated to improving the quality of life of persons with brain injury, as well as promoting research, education, and prevention of brain injuries. With 42 state associations, BIA serves persons with brain injuries, their families, and caregivers in all 50 states and the territories. BIA serves numerous young adults and children who require special education and a wide variety of related services, including school health services.

The Center for Law and Education is a national legal support and advocacy organization representing parents and students in efforts to improve the quality of public education for low-income children and youth. Since its founding in 1969, the Center has worked to vindicate the rights of all students with disabilities to full and equal opportunity in public education, through participation in litigation, legislative and administrative advocacy, the provision of technical assistance to other attorneys, and training for attorneys, parents, and other advocates. The Center has participated as counsel and as *amicus curiae* in numerous cases implicating rights under the IDEA, including *Florence County Sch. Dist. No. 4 v. Carter*, 510 U.S. 7 (1993) and *Honig v. Doe*, 484 U.S. 305 (1988).

CH.A.D.D. is a nonprofit organization that works to improve the lives of people with Attention Deficit/Hyperactivity Disorder through education, advocacy, and sup-

port. CH.A.D.D. is comprised of 35,000 professional and parent members, with approximately 500 parent-based chapters throughout the United States. CH.A.D.D. is committed to ensuring that all students with disabilities receive appropriate special education and related services to meet their individual needs.

DREDF is a national law and policy center dedicated to protecting and advancing the civil rights of people with disabilities, and securing equal citizenship for all people with disabilities. Pursuing its mission through education, advocacy, and law reform efforts, DREDF is nationally recognized for its expertise in the development and the interpretation of federal disability civil rights laws. DREDF assists hundreds of parents and their children and recognizes the importance of the provision of related services to ensure that children with significant disabilities are educated in public schools in their communities.

HECSE is comprised of colleges and universities that grant doctorates in special education. HECSE has a general interest in policy issues affecting special education.

The Judge David L. Bazelon Center for Mental Health Law, formerly the Mental Health Law Project, is a national legal advocacy organization representing adults and children with mental disabilities. Since 1972, the organization has been involved in efforts to promote appropriate special education for children with emotional and behavioral disorders. The Bazelon Center has appeared as *amicus curiae* in *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) and *Honig v. Doe*, 484 U.S. 305 (1988).

The National Assistive Technology Advocacy Project, a project of Neighborhood Legal Services in Buffalo, New York, provides technical assistance, training, and a range of support services to attorneys, paralegals, and advocates nationwide, who are seeking to obtain funding for assistive technology devices and services that will allow persons with disabilities to overcome the limitations imposed by their disabilities. The National Assistive Technology Advocacy Project has an interest in ensuring that children who are dependent on technological intervention in order to fully participate in school activities have access to the individual services and technology they need in order to attend and remain in school.

NPND is an organization comprised of parent training and information centers, parent organizations, and parents and professionals who work together on behalf of children and youth with disabilities by assisting their parents and other family members. NPND is committed to ensuring that all children and youth with disabilities obtain appropriate special education and related services.

TASH is an international advocacy organization comprised of persons with disabilities, their relatives, other advocates, and persons who work in the disability field. TASH's mission is to eliminate physical and social obstacles that prevent equity, diversity, and quality of life, and to advocate for full inclusion of all people in all aspects of society. TASH places a premium on the inclusion of all students with disabilities in their schools and their communities.

Amici curiae are extremely familiar with the barriers faced by students with disabilities as they attempt to obtain the free appropriate public education to which they are entitled under the IDEA and other laws. These organizations and the members they represent have direct experience with students who have been excluded from school, denied the appropriate services they need to obtain a meaningful education, or who have failed to receive appropriate services in a timely manner. These organizations and the members they represent have a direct stake in the interpretation of the IDEA, including the scope of the definitions of "related services" and "medical services," and have an interest in ensuring that students with disabilities have full access to appropriate special education and related services in the least restrictive environment, as required by federal laws.

Amici curiae file this brief to establish a context for the interpretation of these terms, and to highlight the critical difference the provision of health services can make for students who would otherwise be deprived of the opportunity to attend school.

SUMMARY OF THE ARGUMENT

In enacting the IDEA in 1975, Congress sought to end the long history of exclusion of children with disabilities from our nation's public schools. Congress mandated that *all* children with disabilities, regardless of the nature or the severity of their disabilities, be provided with a free appropriate public education. Recognizing that educational services alone would not guarantee all children with disabilities access to an appropriate education, Congress also mandated the provision of related services. Related services, which include such services as physical and occupational therapy, speech therapy, and other health services are a critical element of an appropriate education for some students; without these services, their entitlement to an appropriate public education would be rendered meaningless.

In *Irving Independent School District v. Tatro,* 486 U.S. 833 (1984), this Court clearly distinguished between health services that are included within the scope of the IDEA and medical services that are excluded under the IDEA, by concluding that if the service can be provided by a non-physician, it is a health service that school districts must provide under the IDEA. Subsequent cases refusing to apply this "bright-line" test have impermissibly included additional criteria as part of the process of developing an individualized education plan (IEP) for a child. Such criteria, which include the nature and scope of the service, the complexity of the service, the frequency of the service, the burden of providing the service, and cost, are criteria that are not applied to decisions regarding other related services and, in fact, these criteria have no place in the decisionmaking process. The IDEA requires

that decisions regarding necessary related services, and the amount and frequency of those services, be based on the unique needs of the student, not on extrinsic criteria such as frequency of service or the burden to the school system of providing the service.

Whether or not the services needed by Garret F. and a small number of other students were provided in schools prior to enactment of the IDEA is not relevant to the determination of whether the services are "school health services" or "related services" under the IDEA. Traditionally, schools provided very few, if any, special education services or related services to students with disabilities. The IDEA was first enacted to remedy this situation, and it required schools to provide a range of new services so that children with disabilities would be able to attend school. The IDEA is a "zero reject" statute; it requires that appropriate special education and related services be provided to *all* children, regardless of the severity of their disabilities. To deny students such as Garret F. access to school-based health maintenance services would undermine the intent of the IDEA and reverse 25 years of legislative policy and legal mandates.

The IDEA's mandate that students receive their special education in the least restrictive environment requires that states ensure that students such as Garret F. receive the health services they need. Garret F. and other similarly situated students have disabilities that require ongoing monitoring and health maintenance services, but they are not ill; they are able to attend and participate in school if the necessary health services are made available. Without these services, students such as Garret F. are destined to spend their days at home or in institutions, in isolation from their peers and from the stimulation that children derive from being in a school setting.

There is no reason for this Court to reverse its ruling in the *Tatro* case by expanding the medical services exclusion. In fact, changes in law and public policy and in

medical technology since the *Tatro* decision provide even more support for a limited view of the medical services exclusion, rather than a broader approach. Enactment of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, and the reauthorization of the IDEA in 1997, are strong legal and policy statements that persons with disabilities are to be integrated as much as possible into the life of their communities, and that support services or accommodations are to be provided to persons with disabilities to enable them to be as independent as possible. Affirming the decision by the Eighth Circuit will safeguard these rights and further this public policy by allowing the small group of students whose school attendance depends on the availability of health services to benefit fully from the promise of the IDEA by attending school and participating in school life.

ARGUMENT

I. THE IDEA REQUIRES THE PROVISION OF HEALTH SERVICES TO STUDENTS WITH DISABILITIES SUCH AS GARRET F.

A. This Court's Decision in *Irving Independent School District v. Tatro*, 486 U.S. 833 (1984), Established A Bright-Line Test to Distinguish Between Required Health Services and Excluded Medical Services Under the IDEA.

In the *Tatro* case, this Court addressed the question of whether the IDEA's predecessor statute, the Education of All Handicapped Children Act, 20 U.S.C. 1400 *et seq.*,[2] required a school district to provide a student with disabilities with clean intermittent catheterization. In resolving this issue, this Court analyzed the construction of

[2] The statute has been reauthorized and renamed several times since the *Tatro* case was decided. For ease of reference, the statute is referred to as the IDEA throughout this brief, and references are to the current statutory sections. Likewise, the regulations were revised and reissued in 1992; reference to regulatory sections will be to the 1992 regulations, which remain in effect today.

several provisions of the statute and the implementing regulations issued by the United States Department of Education.

This Court noted that the statute mandated the provision of special education and related services to children with disabilities to meet their unique needs. 20 U.S.C. 1400(c).[3] Related services are those "developmental, corrective, and other supportive services" that are necessary to assist a child with disabilities to benefit from special education. 20 U.S.C. 1401(22). Related services include medical services for the purpose of diagnosis or evaluation only. *Id.*

In examining the regulations issued by the Department of Education, this Court noted that the definition of related services includes "school health services," and that such services are defined as "services provided by a qualified school nurse or other qualified person." 34 C.F.R. 300.16(b)(11). The regulations define "medical services" as "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. 300.16(b)(4).

In reaching its decision, this Court set out a three part test for determining if a health service is a related service under the IDEA. First, in order to be entitled to health services, the child must be disabled and in need of special education. Second, the services must be necessary for the child to benefit from special education. If the service can be provided to the child at a time of the day other than during school hours, for instance, the school system does

[3] In the IDEA Amendments of 1997, Pub. L. 105-17 (June 4, 1997), Congress emphasized that another purpose of the IDEA is to prepare students for employment and independent living. Congress did not, in this reauthorization of the IDEA, undermine the pertinent United States Department of Education regulations or change the statutory definition of related services, other than to add orientation and mobility services to the definition.

not have to provide the service. Finally, the health services must be able to be provided by a nurse or other qualified person. If the services must be provided by a physician, they are not considered "related services." *Tatro*, 468 U.S. at 894. This Court found that the regulations promulgated by the Department of Education constituted a "reasonable" interpertation of the statute. *Tatro*, 468 U.S. at 892.[4]

Since this Court has already determined that the Department's regulations regarding medical services and related services constitute a reasonable interpretation of the statute, departure from this decision should occur only if there is "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). The Garret F. case presents no such reason for this Court to depart from its *Tatro* ruling. The physician/non-physician test is an easy, workable test for determining if a health service is a related service under the IDEA, and it was unanimously adopted by this Court. *See, e.g., Swift and Co. v. Wickham*, 382 U.S. 111, 116 (1965) (departure from precedent may occur if rule defies practical workability). The test has been used to help define the scope of related services required to be provided to students with disabilities; altering the

[4] In reviewing an agency's construction of a statute, the court must look at whether or not Congress has spoken directly to the precise question at issue; if not, the court asks, as this Court did in the *Tatro* case, whether or not the agency's regulations are based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

It is also important to note that in reauthorizing the IDEA in 1997, Congress retained the requirement prohibiting the promulgation of any regulations that would "procedurally or substantively lessen the protections provided to children with disabilities under this Act, as embodied in regulations in effect on July 20, 1983. . . ." 20 U.S.C. 1406(b). Thus, Congress has approved the Department's 1983 regulations, which include the school health services and medical services definitions addressed by this Court in the *Tatro* case.

test laid out in *Tatro* would, in fact, jeopardize the programs of all students with disabilities who receive related services, since many of the services listed in the definition, such as occupational and physical therapy, are "medical" as well as educational in nature.

The *Tatro* test has proven to be a vibrant, viable doctrine. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989) (departure from precedent if development of related principles of law have left the old rule no more than a remnant of abandoned doctrine). It has been followed by other courts besides the Eighth Circuit. *See, e.g., Macomb County Intermediate Sch. Dist. v. Joshua S.*, 715 F. Supp. 824 (E.D. Mich. 1989), and *Skelly v. Brookfield Lagrange Park Sch. Dist.* 95, 968 F. Supp. 385 (N.D. Ill. 1997).[5] There has been no change of facts that warrants a rejection of the *Tatro* bright-line test. *See, e.g., Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (facts have so changed that old rule has been robbed of significant application). Nor is there any provision of the recently reauthorized IDEA that would justify, or even permit, reversing this Court's ruling in the *Tatro* case. To the contrary, the lengthy deliberative process during the reauthorization of the IDEA in 1997 provided Congress with the opportunity to amend the statute with the intended effect of overruling the *Tatro* holding, and Congress chose not to do so.[6] Furthermore, the *Tatro* "bright-line" test is based

[5] In *Morton Community Sch. Dist. No. 709 v. J.M.*, 986 F. Supp. 1112 (C.D. Ill. 1997), No. 97-3962 (7th Cir., July 27, 1998), the District Court adopted the *Tatro* bright-line test as well. The Seventh Circuit Court of Appeals did not adopt the bright-line test, but found, in its decision of July 27, 1998, that the student was entitled to receive, in school, the health services he needs.

[6] Congress was well aware of its authority to undermine the *Tatro* holding; during the 1986 reauthorization of the IDEA, Congress deliberately chose to overrule legislatively this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984).

exactly upon the wording of the regulation, which has not changed. Today, as in 1984, the Department of Education's interpretation of the statute is entitled to due deference.[7]

The *Tatro* bright-line test promotes the intent of Congress to ensure that all students with disabilities, including those with health-related needs, have the opportunity to attend school and receive appropriate educational and related services in the least restrictive environment. If this Court effectively reverses the *Tatro* decision by reversing the Eighth Circuit decision in the instant case, there is a very real threat that school systems will impose impermissible criteria when determining whether to provide other related services as well. This would eviscerate the IDEA because it would shift the focus of the decisionmaking process from a determination of whether the services are necessary to enable the child to benefit from his or her special education in light of the child's unique needs—the standard set out in the statute—to a determination of the self-interest of the school district, factoring in considerations that have nothing to do with the child's unique needs. This is clearly not the intent of the IDEA.

B. Subsequent Cases Refusing to Apply the *Tatro* Test Impermissibly Restrict the Scope of "Related Services" Required by the IDEA, and Impose Unjustified Criteria on the Decisionmaking Process Regarding Appropriate Special Education and Related Services for Students with Disabilities.

Some of the cases decided subsequent to *Tatro* have misconstrued this Court's decision, improperly injecting

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7 Significantly, the Department's proposed regulations implementing the IDEA as reauthorized and amended by the IDEA Amendments of 1997, retain the current regulatory provisions concerning the medical services exclusion and school health services. *See* Notice of Proposed Rulemaking, 62 Fed. Reg. 55025, 55071-55072 (October 22, 1997).

other factors into the determination of whether health-related services necessary to allow a child to benefit from special education will, in fact, be provided. These additional improper criteria include the nature and scope of the health service, the complexity of the health service, the frequency with which the service must be performed, the burden to the school system of providing the service, and cost. *See, e.g., Neeley v. Rutherford County Schools,* 68 F.3d 965 (6th Cir. 1995), *cert. denied,* 517 U.S. 1134 (1996); *Clovis Unified Sch. Dist. v. California Office of Administrative Hearings,* 903 F.2d 635 (9th Cir. 1990); *Detsel v. Board of Educ. of Auburn Enlarged City Sch. Dist.,* 820 F.2d 587 (2d Cir. 1987) (per curiam), aff'g 637 F. Supp. 1022 (N.D.N.Y. 1986), *cert. denied,* 484 U.S. 981 (1987); *Fulginiti v. Roxbury Township Pub. Sch.,* 921 F. Supp. 1320 (D.N.J. 1996), *aff'd without published opinion,* 116 F.3d 468 (3d Cir. 1997); *Granite Sch. Dist. v. Shannon M.,* 787 F. Supp. 1020 (D. Utah, C.D. 1992); *Bevin H. v. Wright,* 666 F. Supp. 71 (W.D. Pa. 1987).

The problem with this approach is threefold. First, it is grounded on a misunderstanding and misuse of language from this Court's opinion in *Tatro.* In *Tatro,* this Court stated that the Department of Education's interpretation of the statutory limitation on medical services, i.e., the Department's view that 1) this limitation excludes only services provided by a physician, and 2) health-related services provided by a non-physician are within the statutory mandate for the required related services, was reasonable because the Department "could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." 468 U.S. 883, 892.

Taking this language out of its context, decisions such as *Detsel, supra,* and *Neeley, supra,* have relied upon it in improperly limiting the availability of school health

services. From its context in the *Tatro* decision, however, it is clear that this Court's statement concerning unduly expensive services was intended to buttress this Court's determination that the Department's regulations interpreted the statute in a reasonable manner. The statement was not made in the context of articulating a standard for determining whether the assistance sought by the student in *Tatro* was required to be provided as a related service. This Court simply did not make the cost of school health services part of a test of any sort for determining whether school health services fall within the medical services exclusion.

Second, there is no basis in the statute or the regulations, or in the *Tatro* decision interpreting the statute and regulations, for adding these considerations to the determination of whether a particular service meets the definition of a "related service" which must be provided. This Court determined in the *Tatro* case that the Department of Education's regulations constituted a permissible construction of the statute. Therefore, the regulations are binding. Courts cannot substitute their judgment for that of the agency designated by Congress to interpret the statute. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[8]

Third, and more fundamental, use of additional criteria to determine if health services are a necessary component of a student's IEP warps the decisionmaking process by improperly subjecting consideration of health services to an analysis that cannot legitimately be done for other

[8] Significantly, the United States Department of Education has consistently continued to adhere to this interpretation of its regulations in its policy letters. *See, e.g.*, Letter to Anonymous, 25 Ind. Disab. Educ. L. Rep. 531 (Nov. 13, 1996); Letter to Anderson, 24 Ind. Disab. Educ. L. Rep. 180 (Feb. 22, 1996); Letter to Johnson, 20 Ind. Disab. Educ. L. Rep. 174 (Apr. 20, 1993); Letter to Greer, 19 Ind. Disab. Educ. L. Rep. 348 (July 14, 1992); Letter to Del Polito, Educ. Handicap L. Rep. 211:392 (June 24, 1986).

services the student may need, such as physical or occupational therapy. The IDEA does not permit a decision about physical therapy, for example, to be made on the basis of the frequency of therapy hours needed, the cost of the physical therapist, the type of physical therapy services, or the complexity of the student's physical therapy needs. The sole criterion governing the determination of services a student should receive is whether or not the student's unique needs make those services necessary for the child to receive meaningful educational benefit. 20 U.S.C. 1414(d).

There should be nothing unique about health services that makes the decisionmaking process different for those services, and in fact, it is illogical to define a service by extraneous factors such as frequency of service. If the health service is a developmental, corrective, or supportive service, it can be performed by a non-physician, and it is necessary for the student to benefit from his or her special education, then it is a related service that must be provided under the IDEA.[9]

By including related services in the statute, Congress clearly recognized the need for schools to provide sup-

[9] The concern with cost in this case is legally misplaced. The IDEA has never been interpreted to permit the denial of programs or services *necessary to* provide a child with a free appropriate public education simply on the basis of cost. Some Courts of Appeals have held that cost may be taken into account in choosing between two educational placements, each capable of providing a free appropriate public education, *see, e.g. Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514 (6th Cir. 1984), and that, under certain limited circumstances, cost considerations may justify centralizing certain kinds of special education services within a particular school within a school system, rather than offering these services in all schools. *See, e.g., Barnett v. Fairfax Co. Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991). These, however, are separate questions entirely from the question of whether or not a service is a related service. Cost is not, and cannot be, part of the definition of a related service under the IDEA.

portive services to students with disabilities as part of an appropriate education program. The Department of Education's inclusion of school health services in its definition of related services recognizes that nurses are part of the group of service providers intended to provide services to children with disabilities in the school setting. The Department's regulation has been approved by this Court and promotes Congressional intent by recognizing that some students who traditionally were institutionalized or excluded from school will need health and other related services in order to attend school and benefit from education services.

C. Because the IDEA When Enacted Imposed New Requirements on School Districts by Mandating a Range of Services not Previously Provided by Schools, Whether or Not Certain Health Services Were Provided by Schools Prior to Enactment of the IDEA is Not Relevant.

Contrary to the position of Petitioner (Pet. Br. at 39) and its Amicus (Am. Br. for Pet. at 20-21), the fact that certain health services were not provided by schools prior to enactment of the IDEA is not relevant. Special education itself was not traditionally provided to students. Neither were many of the other services required by the IDEA, which is why so many students with disabilities were excluded from school, and why the IDEA was enacted in the first place.[10] The fact, therefore, that schools have not in the past provided health services to students

[10] In enacting the Education of the Handicapped Act in 1975, Congress found that "more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity" and that "one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers." 20 U.S.C. Section 1400(b); *See also Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 191 n.13.

such as the services needed by Garret F. is irrelevant to the determination of whether those services qualify as related services that belong on his IEP.

Under the IDEA, many services, some costly, are required to meet the individual needs of students with disabilities, and this Court noted in *Tatro* that "Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as 'trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel.'" 486 U.S. at 893 (cite omitted). This Court also declared in *Tatro*: "A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned." *Id.* at 891.

If Petitioner's argument is adopted, students such as Garret F., who have severe physical disabilities, will return to the status they held before the IDEA was enacted; that is, they will be excluded from public school. It is incontrovertible that in enacting the IDEA, Congress intended to make appropriate educational services available to *all* children with disabilities:

> The language of the Act could not be more unequivocal. The statute is permeated with the words 'all handicapped children' whenever it refers to the target population. It never speaks of any exceptions for severely handicapped children. Indeed, the Act gives priority to the most severely handicapped . . . The language of the Act in its entirety makes clear that a 'zero reject' policy is at the core of the Act, and that no child, regardless of the severity of his or her handicap, is ever again to be subjected to the deplorable state of affairs which existed at the time of the Act's passage, in which millions of handicapped children received inadequate education or none at all.

Timothy W. v. Rochester, New Hampshire Sch. Dist., 875 F.2d 954, 960-61 (1st Cir. 1989).

Petitioner proposes that public schools abandon children such as Garret F. at home, denying to them the opportunity to receive the health maintenance services they need in order to attend school and live full lives in the community. Significantly, Petitioner offers no reasonable alternative for Garret F.: If he does not receive these services at school, he simply cannot attend school. It is beyond doubt not only that Congress did not intend this result when it enacted the IDEA, but also that Congress intended exactly the opposite—in other words, that Congress intended that children such as Garret F., children traditionally excluded from school, be provided with the services that would enable them to attend school. *See, e.g., Timothy W.*, 875 F.2d at 962-68 (extensive discussion of legislative history).

D. The Least Restrictive Environment Requirements of the IDEA Support the Inclusion of the Disputed Health Services as Related Services.

The IDEA requires that to "the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled" and that "special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. 1412(a)(5). The IDEA regulations establish a presumption that "unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled." 34 C.F.R. 300.552(c).

The health services required by Garret F. and a small number of other students [11] are necessary in order for

[11] It can be assumed that the majority of students who need health services such as those needed by Garret F. fall into the IDEA disability categories of "other health impaired" and "multiply disabled." During the 1995-96 school year, children identified as having other health impairment or multiple disabilities represented only 4.5% of the total number of students aged six to 21 who were receiving special education services. *See* United States Department of Education, Office of Special Education and Rehabilitative Services, 19th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, Table AA9, pages A-20, A-25, and A-28. Since children with disabilities as diverse as attention deficit disorder, asthma, and HIV infection may be identified as other health impaired, and since many students with multiple disabilities do not have ongoing health service needs, it can also be assumed that the number of students like Garret F. who need ongoing health services in order to attend school safely is very small.

these students to attend school at all. In the *Tatro* decision, this Court noted that the statute requires services such as transportation and authorizes grants for physical alterations to make buildings and equipment accessible to students with disabilities and declared: "Services like [clean intermittent catheterization] that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school." 486 U.S. at 891. Without provision of these services, Garret F. and other similarly situated students cannot attend school at all. They are unnecessarily relegated to their homes, where they might inappropriately receive a few hours a week of home teaching from an itinerant teacher in an unduly restrictive placement that violates least restrictive environment rights, isolates them from their peers, fails to prepare them for independent living, fails to meet the legal standards of a free appropriate public education, and violates the rights of these children under Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. 794, *et seq.* to receive benefits and services comparable to those afforded their peers. *See* 34 C.F.R. 104.4(b).

Typically, home teaching consists of only a few hours per week, with a single teacher expected to cover all of

the subjects the student is studying. American Academy of Pediatrics, Children with Health Impairments, 86 Pediatrics 636 (1990). Moreover, without health services at home during school hours, home teaching itself might prove impossible. Parents might be forced to give up their employment or to institutionalize their children in order to obtain for them basic health maintenance services that could easily be provided in the community. Institutionalization in order to obtain services that can actually be provided in the community is a drastic means of addressing the issue and violates the basic principle of providing services in the least restrictive environment.

Even if a child is able to receive health services at home, home teaching is an inadequate means of providing educational services. While home teaching is recognized as a part of the continuum of services required by the IDEA regulations, 34 C.F.R. 300.551, it is considered one of the most restrictive placement options, if not the most restrictive option, and it should not be used unless a child is too ill to attend school. The statutory definition of the 'free appropriate public education' to which all children with disabilities are entitled under the IDEA requires as much. Under the IDEA, "free appropriate public education" means:

> special education and related services that (A) have been provided at public expense, under public supervision and direction, without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary or secondary education in the State involved, and (D) are provided in conformity with the individualized education program . . .

20 U.S.C. 1401(8). Home instruction, particularly the time and subject matter-limited type routinely provided by many school districts, can rarely meet this standard. In addition, most states and many local school systems have adopted minimum requirements regarding the length of the school day, the content of curricula and the amount

of time during the day that must be devoted to academic instruction. These requirements define in part "an appropriate elementary or secondary education in the state involved," 20 U.S.C. 1401(8)(C), and, to the extent that they are adopted or approved by the state, are "standards of the state agency" that must be met pursuant to 20 U.S.C. 1401(8)(B). Home teaching often fails to provide a "free appropriate public education" on these bases as well.[12]

In addition, home teaching deprives children of their peers, of the multiple pedagogical strategies and other benefits of being in a classroom setting, of the intellectual stimulation of school attendance, of field trips, assemblies, recess, and of the range of activities both during and after school that are available to students in the school setting. As this Court recognized in *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982) one of the basic purposes of the IDEA was to "open the door of public education" to children with disabilities.

Use of home teaching for a student who would be able to attend school with the provision of health services is a

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[12] In addition, it is significant that in reauthorizing the IDEA in 1997, Congress required that even children with disabilities who are placed in an "interim alternative educational setting" for up to 45 days for discipline reasons receive educational programming not feasibly provided in a home setting. *See* 20 U.S.C. 1415(k)(3)(b) (interim alternative educational setting must "be selected so as to enable the child to continue to participate in the general curriculum . . . to continue to receive those services and modifications, including those in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and . . . include services and modifications designed to address the behavior [that led to placement in the interim alternative setting] . . . so that it does not recur.")

In this context, it becomes even clearer how directly contrary to the IDEA and public policy it would be to permit a construction of the IDEA that would deprive students of the ability to attend school, simply because they have a need for health maintenance services during the school day.

clear violation of the least restrictive environment provisions of the IDEA because it denies the student the opportunity to participate fully in the school program and to learn through interaction with others. As the Ninth Circuit Court of Appeals has stated:

> Hospitalized and homebound care should be considered to be among the least advantageous educational arrangements [and are] to be utilized only when a more normalized process of education is unsuitable for a student who has severe health restrictions.

Department of Education, State of Hawaii v. Katherine D., 727 F.2d 809, 818 (9th Cir. 1983).

Particularly because Congress was clear that even children in institutions are to receive services with nondisabled children to the maximum extent appropriate, 20 U.S.C. 1412(a)(5), the medical services exclusion of the IDEA cannot be read so broadly as to undermine the statute's least restrictive environment mandate.[13] That is exactly what will happen, however, if the services needed by Garret F. and other similarly situated students are excluded from the IDEA's coverage, even though the services are supportive and can be provided by someone other than a physician. It is important to note that while the

[13] In addition, in amending the IDEA in 1997, Congress strengthened the statutory presumption that students with disabilities are to be educated alongside peers. Prior to the 1997 amendments, schools were required to include in each child's IEP "a statement of . . . the extent to which such child will be able to participate in regular educational programs." 20 U.S.C. 1401(a)(19)(C). However, now schools must include in the IEP "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in clause (iii)." 20 U.S.C. 1414(d)(1)(A)(iv). Activities described in "clause (iii)" include "to be involved and progress in the general curriculum . . . and to participate in extracurricular and other nonacademic activities" and "to be educated and participate with other children with disabilities and nondisabled children. . . ." 20 U.S.C. 1414(d)(1)(iii)(II), (III).

services needed by Garret F. may be essential to maintain life, they are routine, common services that a person, when trained, can perform without difficulty.[14] This Court must recognize that these services are included within the scope of the IDEA so that the students in need of these

[14] Much has been made in this case, and in other cases involving a student's need for ongoing health services, about whether the services must be provided by a licensed nurse or can be delegated to a trained but unlicensed person, such as a paraprofessional. Often, the parties have agreed that, but for the existence of a state law governing nursing practice and delegation of nursing tasks, the care could be provided by a trained, unlicensed person, and in fact, parents and family members have often been trained to provide this health care in their homes and communities.

The fact that a state's nurse practice act may pose a barrier to the use of unlicensed persons to provide health services to students in school is the state's issue to resolve; it does not have a bearing on whether the student is entitled to the services under the IDEA. Rather, it has a bearing only on whether an unlicensed person may provide the services or a licensed nurse is required. In either case, the service is required by the IDEA. If a state chooses to prohibit properly trained, qualified paraprofessionals from providing services, it must bear the costs. In the alternative, it may change its law or policy to permit the use of paraprofessionals. It may not, however, choose to prohibit the use of paraprofessionals and use that prohibition as an excuse for denying children services that are required by the IDEA.

Obviously, to the extent that unlicensed persons are allowed to provide health services to students in school, the cost of such services will be reduced. Should licensed nurses be required, a school system may reduce the cost by obtaining reimbursement for the services from Medicaid or private insurance benefits to the extent that the student's access to health insurance is not reduced or jeopardized by such utilization of benefits, and that lifetime benefits or the level of services provided to the student outside of school are not reduced by such utilization of benefits. In fact, pursuant to the reauthorized IDEA, state education agencies are obligated to arrange for payment from other public agencies for the costs of providing a free appropriate public education to students with disabilities. 20 U.S.C. 1412(a)(12). The obligation to provide the services rests with the education agency in the first instance; if no other agency is responsible for payment, the education agency also becomes the payor of last resort.

services can attend school. The IDEA does not contemplate that a certain group of children with particular health care needs can be carved out from the statute's least restrictive environment requirements.[15]

II. PUBLIC POLICY, CODIFIED IN EVERY LEGISLATIVE ENACTMENT AFFECTING THE RIGHTS OF PERSONS WITH DISABILITIES SINCE 1973, REQUIRES THE PROVISION OF SERVICES THAT WILL ENABLE STUDENTS WITH DISABILITIES TO ATTEND SCHOOL.

A. The Legislative History of the IDEA and the Findings Made by Congress in Reauthorizing the IDEA in 1997 Make Clear that All Children with Disabilities are to Receive Services to Enable Them to Attend School.

In its first interpretation of the IDEA, this Court stated: "Congress sought primarily to make public education available to handicapped children" and "to make such access meaningful." *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982). In 1975, when the statute was enacted, many children with disabilities were excluded from school entirely, were not properly identified, did not receive appropriate services, or were placed in private schools by their parents because of a lack of services within the public school system. *See generally*, 20 U.S.C. 1400(c). That society has increased its expectations for students with disabilities and has recognized the importance of education in enabling students wtih disabilities to meet these raised expectations is evident from the findings made by Congress when it reauthorized the IDEA in 1997:

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[15] In fact, in reauthorizing the IDEA in 1997, Congress strengthened even more the systemic requirements regarding placement of students in the least restrictive environment by mandating that states have policies and procedures in effect that ensure that their funding mechanisms do not result in placements that violate the least restrictive environment provisions of the statute. 20 U.S.C. 1412(a)(5)(B).

> The Congress finds the following:
>
> (1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities. . .
>
> (4) . . . the implementation of this Act has been impeded by low expectations . . .
>
> (5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—
>
> (A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible; . . .
>
> (D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate . . .

20 U.S.C. 1400(c).

In reauthorizing the IDEA, Congress affirmed

> the longstanding concept of the least restrictive environment, including the policy that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of special education and related services or supplementary aids and services cannot be achieved satisfactorily.

Reort of the Committee on Education and the Workforce House of Representatives, May 13, 1997, p. 91. *See also* 20 U.S.C. 1412(a)(5).

With an increased emphasis in the reauthorized IDEA on higher expectations, participation in the general curriculum, and the goal of independence and community participation by children with disabilities, Congress clearly intended to strengthen the ability of children with disabilities to receive appropriate special education and related services in the least restrictive environment. It would be anomalous and in direct contravention of Congress' intent to deprive a group of children with disabilities of the opportunities outlined by Congress, simply because they have an ongoing need for particular health services a school district does not wish to provide.

B. The Enactment of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, Underscores the Public Policy Imperatives of Integrating Persons with Disabilities Into Their Communities.

Petitioner's arguments, if adopted, threaten to undercut more than 20 years of disability policy. Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The ADA builds on the nondiscrimination and integration requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 *et seq.*, 34 C.F.R. Part 104, expanding the scope of Section 504 to public accommodations and local and state governments.

In enacting the ADA, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities" and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress also found that

> individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5).

Ttile II of the ADA prohibits discrimination against individuals with disabilities in the provision of services by state and local governments. The legislative history of the ADA makes clear that, as with Section 504, the purpose of Title II is "to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life." H.R. Rep. No. 101-485, pt. 3 at 49-50, reprinted in 1990 U.S.C.C.A.N., Vol. 4 at 472-473. Recognizing the damage that segregation of persons with disabilities causes, the House Report further noted that "segregation for persons with disabilities 'may affect their hearts and minds in a way unlikely ever to be undone.'" H.R. No. 101-485, pt. 3 at 26, reprinted in 1990 U.S.C.C.A.N., Vol. 4 at 448-449 (cite omitted). Further, the House Report explained:

> The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 of the Rehabilitation Act or this title . . . . The existence of such programs can never be used as a basis to . . . refuse to provide an accommodation in a regular setting.

H.R. Rep. No. 101-485, pt. 3 at 50, reprinted in 1990 U.S.C.C.A.N., Vol. 4 at 473.

According to the regulations governing Title II, "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. 35.130(d). This "integration mandate" as it has come to be called, has been analyzed and upheld in recent

court cases. The Third Circuit Court of Appeals analyzed the legislative history of the ADA and found that the Pennsylvania Department of Public Welfare violated Title II of the ADA by failing to provide community-based attendant care services to persons who were unnecessarily confined in the overly restrictive setting of a nursing home. *Helen L. v. Didario*, 46 F.3d 325 (3d Cir. 1995). The Court found that the 28 C.F.R. 35.130(d) has the "force of law" and that "the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled." *Helen L.*, 46 F.3d at 332, 333.

Most recently, the Eleventh Circuit Court of Appeals held that the state of Georgia violated the ADA by unnecessarily confining two individuals with mental illness in a state psychiatric facility, rather than providing community-based services to them. The court analyzed the legislative history of the ADA and found that the plain language of the ADA regulations prohibits a state from providing services to individuals with disabilities in an unnecessarily segregated setting. *L.C. v. Olmstead*, —— F.3d —— (11th Cir. 1988).

Students such as Garret F. are included within the scope, not only of the IDEA, but of the ADA as well. The legislative history of the ADA, the language of the ADA, and the court interpretations of this civil rights statute make clear that community integregation is the foundation of erasing discrimination against persons with disabilities. To confine students such as Garret F. to their homes or to institutions simply because they need particular health services in order to attend school safely would undermine the spirit and the intent of the ADA.

C. Public Policy and Legal Mandates Have Recognized that Persons with Disabilities Can, with Appropriate Supports, Services, and Accommodations, be Productive, Participating Members of Their Communities, and that Access to Education is an Important Foundation for this Community Participation.

There has been a significant change in public policy over the last 25 years as the benefits of the Rehabilitation Act of 1973, 20 U.S.C. 794 *et seq.*, with its focus on maximizing employability and community integration of individuals with disabilities, and the IDEA, and then the enactment of the ADA and the reauthorized IDEA were recognized, and it is apparent that persons with disabilities now have many more opportunities available to them. With the protection of the legal framework that bars discrimination and mandates appropriate supports, services, and accommodations, persons with disabilities have unprecedented opportunities to participate in the life of their communities. Without access to the benefits of attending school, however, these opportunities are unlikely to be fulfilled.

As noted above, in reauthorizing the IDEA, Congress found that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. 1400(c). *Access* to school is a critical element of improving educational results for children with disabilities. The importance of education has long been recognized. For children with disabilities who have health care needs, the opportunity to be educated in a school setting is nothing more than what the law already guarantees and public policy supports. To deprive a small group of students of the opportunity to benefit from attending school runs

counter to all of the principles of the IDEA, the ADA, and other disability laws.

Should this Court overrule the Eighth Circuit, the result will be that a group of students with disabilities *will* be deprived of the opportunity to attend school, unless their parents are able to pay for or otherwise obtain the health care services needed by those students. At a time when society supports the inclusion of persons with disabilities in education, in employment, and in the other activities that make up the fabric of our daily lives, it is essential that this inclusion encompass *all* students with disabilities.

CONCLUSION

For the reasons stated above, the decision of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1997

Cedar Rapids Community School District,
Petitioner,

v.

Garret F., a Minor By His Mother and
Next Friend, Charlene F.,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit**

BRIEF OF AMICI CURIAE AMERICAN ACADEMY OF PEDIATRICS, THE NATIONAL ASSOCIATION OF SCHOOL NURSES, AND FAMILY VOICES IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The American Academy of Pediatrics is a non-profit charitable and educational organization of 53,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults. Formed in the 1930s, it now has 66 chapters in the United States, its territories and Canada. The Academy is dedicated to the principle of a meaningful and healthy life for every child. It seeks to promote this goal by encouraging its members in their efforts to meet the overall health needs of children and youth; by providing support and counsel to others concerned with the well-being of children, their growth and development; and by serving as an advocate for children and their families within the community at large.

The Academy has participated as an amicus in cases before this Court and others involving issues related to the health of minors. The Academy regards this as a case in which it can make a significant contribution to the Court's consideration because of the Academy's understanding of the needs of Garret F. and similar children in a school setting. The Academy, through its committees, has studied issues relating to chronically ill children in schools for years. *See*, *e.g.*, American Academy of Pediatrics Committee on Children with Disabilities, *Children With Health Impairments in Schools*, 86 Pediatrics 636 (1990); American Academy of Pediatrics Committee on School Health, *Qualifications and Utilization of Nursing Personnel Delivering Health Services in Schools*, 79 Pediatrics 647 (1987).

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[1]The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Rule 37.6, none of the parties authored this brief in whole or in part and no one other than amici, their members, or counsel contributed money or services to the preparation or submission of this brief.

The National Association of School Nurses ("NASN") is a non-profit, specialty practice nursing organization established in 1979, with approximately 10,000 members, which represents registered professional school nurses. NASN is committed to promoting quality health services, appropriate health education, and safe environments for all school-age children and youth. School nurses play an integral role in the delivery of school health services to students under the Individuals with Disabilities Education Act ("IDEA"), including assisting in identifying children who may need special education for health-related services, developing individualized health and emergency care plans, assisting in the development of the Individualized Education Program ("IEP") for eligible students, and providing and/or supervising assistive personnel to provide health services in the schooi setting. NASN, as the nation's only organization devoted exclusively to representing the interests of professional school nurses who provide school health services to students with disabilities under IDEA, has a direct interest in the outcome of the case and the Supreme Court's interpretation of the scope of IDEA "related services" and "medical services."

Family Voices is a national, charitable and educational, grassroots organization with more than 16,000 members, founded in late 1992 to speak on behalf of the 12.6 million children in this country who have special health care needs. Most of its members are families who have children with disabilities and/or chronic health conditions. However, many members are health professionals, social workers, researchers, policymakers, state and federal health agency officials and staff, or friends and relatives who also care for and about children with special health care needs. Family Voices focuses on developing and distributing objective, family-friendly materials to families to help them make informed health and other decisions on behalf of their children. Family Voices also advises

families who are negotiating with their school districts about the presence and quality of the health supports their children require in order to attend school. Family Voices, therefore, has an interest in the outcome of this case and in the responsibility of the states to assure adequate supports to students with complex health status.

STATEMENT

Garret F. is an intelligent and motivated boy who wants to continue to join other children his age in enjoying free access to education in America's public school system. *See* Pet. App. 19a. Garret is a special education student, Pet. App. 10a, who is able to attend school in the classroom, and has been attending school since 1988 when he began kindergarten. Pet. App. 2a. But because he is paralyzed from the neck down and ventilator-dependent, he needs certain caretaking tasks performed during school hours in order to attend school. *Id.* These tasks are supportive in nature and permit Garret and his mechanical equipment to function in the school setting and to participate in the educational program with other children. This support is also needed outside the school setting, twenty-four hours a day to permit Garret to live. With it, he is able to be part of his community -- to visit friends and neighbors, take vacations with his family, go on shopping trips, and take part in other activities. Garret's parents, and sometimes his friends, provide these services at home, on weekdays after school until 11:00 p.m. and on weekends without the assistance of health care personnel. Pet. App. 21a; J.A. 3-4, 19-20.

The maintenance procedures Garret requires during the school day are clean intermittent catheterization (approximately once a day), periodic suctioning (cleaning) of his tracheostomy, ventilation by means of an Ambu bag during suctioning, and monitoring his breathing and ventilator in case of malfunction. Pet. App. 24a. It is undisputed that none of these tasks needs to be performed by a physician. Pet. App. 6a, 12a, 15a. It is

also undisputed that without these services, Garret would be unable to attend school. *Id.* at 6a.[2]

Recent medical and surgical advances have markedly improved the outcomes for chronically ill children, and increasing numbers of these children survive into adulthood and are able to attend school and pursue their educational and social development. American Academy of Pediatrics Committee on Children with Disabilities, *Children With Health Impairments in Schools*, 86 Pediatrics 636, 636 (1990). More specifically, increasing numbers of accident victims with serious spinal cord injuries, like Garret, now survive but remain technology-dependent. Marilyn D. Miller et al., *Ventilator-Assisted Youth: Appraisal and Nursing Care*, 25 J. Neuroscience Nursing 287, 287 (1993). The equipment these children need has become smaller and more portable, providing the children with a new level of mobility. *See* Donna H. Lehr and Pat McDaid, *Opening the Door Further: Integrating Students With Complex Health Care Needs*, 25 Focus On Exceptional Children 1, 3 (1993); Nathan Essex et al., *Handle With Care*, 181 Amer. Sch. Bd. J. 50, 50 (1994).

The number of these children remains small, perhaps one-tenth to two-tenths of one percent of children require medical technology on a long-term basis, with feeding tubes, intravenous lines, clean intermittent catheterization, ostomy appliances and respiratory devices, such as tracheostomy tubes, ventilators, and oxygen tanks, among "the most common"

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[2]Garret also requires transportation to and from school, and help to eat and drink, to move about the building, and to turn pages. Petitioner does not challenge its obligation to provide these services, and has provided Garret with a full-time Teacher Associate ("TA"). Pet. App. 27a, 28a. Further, petitioner has stipulated that the person who performs the disputed services could also perform the TA's duties. *Id.*; *see also* Pet. Br. at 6.

technologies. Stephanie Porter et al., *Children and Youth Assisted by Medical Technology in Educational Setting - Guidelines for Care* 4 (1997). Over the past twenty years, "more and more technology-dependent children have entered the mainstream school system." Genie L. Wessel, et al., *School Placement and the Oxygen-Dependent Child*, 4 J. Pediatric Nursing 435, 435 (1989). "[T]here has been an influx of technology-dependent children into schools, and the child requiring oxygen therapy is frequently seen." *Id.*[3]

States and schools throughout the country have demonstrated their willingness and ability to enroll children with serious (and even life-threatening) illnesses such as muscular dystrophy with respiratory compromise, terminal cancer, HIV-AIDS, and end-stage renal disease. These children require and receive a wide variety of related services, enabling them to attend public schools with their peers.

Ventilator-dependent children who are stable, like Garret, can be integrated into their communities, and participate with other children in school and after school activities, if they are provided the maintenance services required. *See, e.g.*, Miller et al., *supra*, at 294-95 (reporting study of 16 ventilator-assisted, cervical-cord injured youth, aged 3 to 19, finding that 13 lived

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[3]*See also* Lehr and McDaid, *supra*, at 2 ("the numbers of students with complex health care needs who are being educated in schools are continually increasing" for two reasons: "[c]hanges in medical technology are enabling children with medical complications to survive" and the "generally increasing practice of normalizing lives for student[s] through the specific practice of including students with more severe disabilities into general education settings"); B.J. Make et al., *Mechanical Ventilation Beyond the Intensive Care Unit, Report of a Consensus Conference of the American College of Chest Physicians*, 113 Chest 289S, 327S (1998 Supp.) ("Many ventilator-assisted children have been successfully attending school for years.").

at home and attended school in classroom settings, with staff at the school trained to meet their specific needs, and that their extracurricular activities included church, 4-H, summer camp, trips to Disney World and family vacations).

The development of modern advances in medications, portable ventilators, non-invasive ventilation techniques, suction machines, wheelchairs with sliding trays for ventilators, effective speaking valves, accessible public and private buildings and transportation makes it possible for ventilator-dependent adults to hold jobs and enjoy social functions and friendships. *See, e.g.*, Tedde Scharf, *Yes, There Is Life After Ventilation*, 103 Chest 1319 (1993). Attending school can prepare children like Garret to take advantage of these "doors to unlimited opportunities [that] have opened" and to develop the intellectual and social skills needed to live "a fully functional, independent existence." *Id.*

SUMMARY OF ARGUMENT

The services at issue here are not treatment. They are not provided by a doctor or hospital. They are simply services necessary to operate and monitor the equipment that substitutes for the functions Garret has lost in order to keep him alive. With that equipment, he is able to be with family and friends and to acquire, from the public school system, the educational and social skills he will need to participate in society initially as a child and later as an adult.

It is undisputed that Garret is capable of attending public school and benefiting from the educational and other opportunities provided by the public school system; he has been doing so for years. The only dispute is whether the Iowa Department of Education's specific finding -- that the monitoring and maintenance services Garret requires while he attends school must be provided, *see* Pet. App. 63a -- is consistent with the statute Congress enacted to encourage states to provide children with disabilities access to public education and consistent with the United States Department of Education's regulations implementing that statute. Because the state agency's decision is consistent with both, *amici* urge this Court to affirm.

1. Congress enacted the Individuals with Disabilities Education Act in order to encourage states to provide public school educations for children with disabilities. Congress predicated federal assistance for educating such children on the states' providing not only special education when needed but also related support services to enable the children to benefit from the education, excepting only medical services other than diagnosis and evaluation. Pt. I.A.

2. The Secretary of Education's implementing regulations -- requiring states to provide nursing services but exempting them from providing services performed by a physician -- are permissible under the statute and therefore due deference under *Chevron*. Pt. I.B.

3. Petitioner's proposed balancing test for differently determining which services are exempt is merely an alternative policy choice. It has no basis in the statute, and is, indeed, *inconsistent* with the statute, as Congress made clear when it prohibited the agency from decreasing required support services below 1982 levels, without unequivocal support from subsequent legislation. In addition, the test petitioner proposes has the practical infirmity of being difficult to apply and to police. Pt. I.C & Pt. I.D.

4. The Iowa Department of Education properly applied the statute and regulations in finding that Garret must be provided the maintenance and monitoring services he requires to attend school. Pt. II.

5. Contrary to petitioner's complaints, the federal government is *not* forcing high costs on school districts. The federal statute and regulations offer states federal assistance if they agree to meet set standards, including providing support services to children with disabilities. States are required to comply *only if* they choose to avail themselves of the assistance. Congress delegated decisions as to the sources of additional funding to the states, so long as there is no charge to the family. Thus, it is the State of Iowa's decision whether the school district, a state agency, the family's insurance, or some combination funds the services Garret requires. Pt. III.

ARGUMENT

I. CONGRESS INTENDED FOR CHILDREN LIKE GARRET TO ATTEND PUBLIC SCHOOLS, AND THE AGENCY'S REGULATIONS FAITHFULLY IMPLEMENT THAT GOAL.

A. The Statute

More than two decades ago, Congress recognized the need to guarantee children with disabilities like Garret a free and appropriate education, and to do so, Congress created significant incentives for states and communities to provide public education for children with disabilities in the Education for All Handicapped Children Act of 1975,[4] now known as the Individuals with Disabilities Education Act ("IDEA").[5] Congress found that there were, in 1975, more than eight million children with disabilities in the United States and that the educational needs of more than half of these children were not being met. 20 U.S.C. § 1400(b)(1) & (2). Congress further found that one million of these children were being excluded entirely from the public schools, and the opportunity to go through school with their peers, because of the lack of adequate services within the public school system. *Id.* at § 1400(b)(4) &

[4] Pub. L. No. 94-142, 89 Stat. 773.

[5] *See* 20 U.S.C. § 1400 *et seq*. The statute was renamed in 1990, as part of the Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat 1103. In 1997, Congress expanded the statute's definition of "related services" to include "orientation and mobility services," and renumbered certain section of the Act. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 45 (codified at 20 U.S.C. § 1401(a)(22)). Citations to the statute in this brief are to the 1994 code in effect when respondent initially sought support services.

(6). The IDEA was enacted in order "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected." *Id.* at § 1400(c).[6]

In order to receive federal funds to assist in providing such an education, states must assure all children with disabilities, regardless of the severity of their disabilities, the right to a free appropriate public education, *Id.* at § 1412(1), (2)(B)-(C), which is defined to include both "special education" and "related services" at public expense and without charge. *Id.* at § 1401(a)(18). The statute defines related services as:

> transportation, and such developmental, corrective, and *other support services* (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, *except that such medical services shall be for diagnostic and evaluation purposes only*) as may be required to assist a child with a disability to benefit from special education....

[6] It is also amici's view that school attendance is preferable to homebound teaching and should be encouraged whenever possible. Homebound teaching has significant limitations, in addition to the isolation of children with disabilities from their peers. It consists typically of only a few hours per week, with a single teacher expected to cover all the subjects the child is studying. *See* American Academy of Pediatrics, *Children With Health Impairments in Schools*, 86 Pediatrics 636, 637 (1990).

20 U.S.C. § 1401(a)(17) (emphasis added).[7] As this Court has found: "the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States . . . ." *Board of Education of Henrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982).

At issue in this case is the scope of the "medical services" exclusion to the statute, Pet. App. 11a, an issue this Court has addressed before in *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). There is no dispute that the services required by Garret are related services within the meaning of the statute. As this Court found in *Tatro*, services "that enable[] a handicapped child to remain at school during the day [are] an important means of providing the child with the meaningful access to education that Congress envisioned." 468 U.S. at 891.

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[7]Contrary to petitioner's assertions, the provision does not purport to enumerate every service that must be provided, Pet. Br. at 10, but simply provides examples of some services that are included in the general category of supportive services. Thus, this Court was not constrained from finding clean intermittent catheterization to be a required supportive service, even though it is not one of the enumerated services. *See Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). Further, petitioner also misreads the statute to find support for its position that the statute imposes obligations to provide only educational services, Pet. Br. at 15-16. The very provision at issue expressly requires services, such as transportation, psychological services, and social work services, which are not themselves educational services but must be provided in order to permit children with disabilities to benefit from educational services.

B. The Department of Education's Implementing Regulations

The Department of Education's implementing regulations define "medical services" as "services provided by a licensed physician." 34 C.F.R. § 300.16(b)(4).[8] Further, the agency regulations include "school health services" among the "related services" that must be provided for children with disabilities, 34 C.F.R. § 300.16(a), and define "school health services" as services that can be provided by a qualified school nurse or other qualified person. 34 C.F.R. § 300.16(b)(11). This Court relied on these regulations to conclude that the Secretary had determined that the services of a school nurse "are not subject to exclusion as a 'medical service,' but that the services of a physician are excludable as such." *Tatro*, 468 U.S. at 892.[9]

Because the Department of Education is the agency entrusted to administer the statute and to issue whatever rules

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[8]Recognizing that the regulation expressly attempted to define only those medical services that are owed to children under the statute, *i.e.*, diagnostic and evaluative services, this Court concluded that the regulation meant "that 'medical services' *not* owed under the statute are those 'services by a licensed physician' that serve other purposes." *Tatro*, 468 U.S. at 892 n.10 (emphasis in original). The Secretary of Education has interpreted these regulations in the same way. See *Assistance to States for Education of Handicapped Children, Notice of Proposed Rulemaking*, 47 Fed. Reg. 33,836, 33,838 (1982).

[9]States are therefore not required to ensure that schools are prepared to provide surgical interventions as needed, such as trimming the tissue around a tracheostomy or performing an incision and drainage of an abscess, or to prescribe medications, or to administer chemotherapy or radiation therapy, or to perform hemo dialysis and transfusions, or to take x-rays, or to provide any other of the array of services provided by doctors or in hospitals.

and regulations are necessary to carry out its provisions, 20 U.S.C. § 1417(b), the Department's elucidation of the medical services exclusion controls unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *accord Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 647-48 (1990). The Department's distinction between services provided by nurses and services provided by doctors or hospitals suffers from none of these infirmities. As this Court noted in *Tatro*, "Congress plainly required schools to hire various specially trained personnel to help handicapped children," and "[s]chool nurses have long been a part of the educational system," while services provided by physicians and hospitals "might well prove unduly expensive and beyond the range of [a school system's] competence." 468 U.S. at 892-93. Thus, this Court determined that "limiting the 'medical services' exclusion to the services of a physician or hospital" was a "permissible construction of the provision" and "entitled to deference." *Id.* at 892-93 (finding clean intermittent catheterization -- one of the services at issue in this case -- a service schools must provide to children who require it in order to attend school).[10]

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[10]Petitioner's claim that the Department's position has changed since *Tatro* has already been contradicted by the government itself. Gov. Br. (*opposing certiorari*) at 8. Moreover, the one letter from anyone in the Department that petitioner chose to submit, Pet. App. 64a-67a, does not evidence any change in the Department's position nor does it purport to interpret the Department's regulations, which are simply spelled out. Pet. App. 66a, n.1. What petitioner attempts to rely on is the program officer's attempt to summarize existing lower court decisions and his abstention from general advice in light of them. Pet. App. 66a-67a. Advice that takes into account the power of courts to set aside the agency's position has no bearing on whether the agency has, in fact, changed its position. What is relevant is that the regulations at issue have not been altered since they were interpreted by both the Department and this Court to draw a bright line between services provided by nurses and services provided by physicians and hospitals.

That this Court's conclusion in *Tatro* is equally applicable when those same regulations are applied to children like Garret is supported by Congress' express intention to provide education to children with severe, as well as moderate, disabilities and to "mainstream" children with disabilities, placing them with children without disabilities, to the extent possible. Thus, Congress made clear that its goal was to reach all children with disabilities "regardless of the severity of their handicap," 20 U.S.C. § 1412(2)(C), and Congress required states, as a condition to receiving federal funds, to give priority to children with disabilities who were not receiving an education and children "with the most severe handicaps who are receiving an inadequate education." *Id.* at § 1412(3).

Congress also expressly provided that children with disabilities be educated with other children "to the maximum extent appropriate" and that "removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes *with the use of supplementary aids and services* cannot be achieved satisfactorily." *Id.* at § 1412(5)(B) (emphasis added). In enumerating some of the supplementary services that schools receiving federal aid were required to provide, *id.* at § 1401(a)(17), Congress named services that require schools to hire specially trained personnel, *Tatro*, 468 U.S. at 893, and that are considerably more pro-active than the support services at issue here. For example, physical and occupational therapy, speech pathology, and audiology all require specialized health care personnel and are aimed at improving the health of the children receiving these services rather than simply maintaining their current health status.

Congress' express intentions -- to reach children with severe disabilities, to include children in regular classrooms whenever supplementary services can make that possible, and to require schools to hire specialists when needed to provide supplementary services -- makes clear that requiring schools to provide services that simply maintain a child while in school so that he can participate in the classroom is wholly consistent with Congress' goals. The Department of Education's implementation of the statute to require states to provide such supplementary nursing services is, therefore, a permissible construction to which this Court should defer.

Petitioner's argument that the "medical services" exclusion is intended to exclude all health care services other than diagnosis and evaluation -- and that therefore the distinction between nurse-provided services and physician-provided services is impermissible -- is contrary to *Tatro*'s specific finding with respect to clean intermittent catheterization and plainly wrong on its face. *See* Pet. Br. at 14-15. Congress' express language contradicts petitioner's claim that Congress meant the scope of "medical services" in Section 1401(a)(17) to be co-extensive with the scope of "medical assistance" in Title XIX of the Social Security Act (Medicaid). In defining "related services" in Section 1401(a)(17), Congress made clear that physical therapy, speech therapy and occupational therapy must be provided, but that no "medical services" need to be provided other than diagnosis and evaluation. Thus, whatever the phrase "medical services" was intended to cover, it did not include physical therapy, speech therapy or occupational therapy. In contrast, the phrase "medical assistance" in Title XIX was expressly defined as including physical therapy, 42 U.S.C. § 1396(d) (1975), and interpreted by the agency to include occupational and speech therapy as well. *See American Physical Therapy Ass'n v. Prudential Life Insurance Corp.*,

502 F.2d 500, 502 (1974). Thus, the text of each statute demonstrates that Congress intended to delineate a narrower scope of services by the phrase "medical services" in Section 1401(a)(17) than it intended to describe by the phrase "medical assistance" in Title XIX.

Petitioner's reliance on the definition of "medical care" in the Internal Revenue Code is similarly unavailing because Congress intended the phrase "medical care" in the tax code to cover a much broader range of services than it intended the phrase "medical services" to cover in Section 1401(a)(17). For example, "medical care" in the tax code has long been understood to include transportation, psychological services, speech therapy, and even tuition for special schools which provide such services.[11] None of these fall within "medical services" under Section 1401(a)(17). Under Section 1401(a)(17), the phrase "medical services" covers diagnosis, evaluation, and those services Congress exempted schools from providing. By expressly requiring schools to provide transportation, psychological services, speech therapy and special education to children with disabilities, Congress makes clear that these are not "medical services" under the IDEA.[12]

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[11] *See, e.g.*, 26 U.S.C. § 213(d)(1)(B) (providing that "medical care" includes amounts paid for transportation to obtain medical care); *Fischer v. Commissioner*, 50 T.C. 164, 175 (1968) (noting Rev. Rul. 143, 1953-2 C.B. 129, finding psychological services included in "medical care"); *Greisdorf v. Commissioner*, 54 T.C. 1684 (1970) (tuition may be deducted as "medical care" when special school provides psychological services); *Weinberg v. Commissioner*, T.C. Memo 1969-003 (1969) (tuition may be deducted as "medical care" when special school provides speech therapy).

[12] Petitioner's attempt to find a discrepancy between the agency's interpretation of Section 1401(a)(17) and the text of Section 1413(e), Pet. Br. at 17, is similarly misguided. Petitioner not only ignores the fact that the phrases at issue are not identical, but also misconstrues Section 1413(e).

C. Petitioner's Alternate Policy Choice

Petitioner's proposed balancing test has no basis in the statute or the regulations, but is merely an alternate view of appropriate federal policy by an interested party. Petitioner impliedly admits this by its failure to cite any authority in support of its proposed test. *See* Pet. Br. at 11, 34. The statute distinguishes between medical services and other support services necessary to permit children with disabilities to benefit from public school education. The regulations implement the distinction as one between physician-provided services and services provided by others, including school-hired nurses. Neither the statute nor the regulations suggest that schools should, or even may, weigh the cost of the services needed or the length of time services are needed. Nor are the "factors" urged by petitioner consistent with any understanding of "medical services" within the medical community. Whatever lines may be drawn between medical and non-medical services within the profession, they are not based on the cost, duration, or technical complexity of the care involved.[13]

Moreover, the proposed balancing test is far from self-executing. Petitioner itself feels obligated to provide nursing

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Section 1413(e) simply assures children with disabilities and, indirectly, schools that funds through Medicaid and the Maternal and Child Health Program remain available as before. Congress had already made clear in the previous section that state agencies other than school districts might be required to pay for some or all of the costs necessary to provide a child with a free appropriate public education. 20 U.S.C. § 1412(6).

[13]For example, both writing a prescription and performing neurosurgery are considered medical services notwithstanding the differences in cost, duration, and technical complexity.

services to children with disabilities and, if needed, a full-time one-on-one support service provider, like the one it has made available to Garret for years. In refusing to provide one-on-one nursing services, petitioner is not drawing a line between nursing and other support services or between hiring personnel and using existing personnel or even between one-on-one services and occasional services. It is simply drawing a line between a less expensive provider of services and a more expensive provider of services.

Moreover, petitioner's proposed balancing test opens the door to the difficult task of drawing many more such lines. At what point do nursing services cost too much? When a service must be performed three times a day? Ten times a day? When a nurse must spend an hour a day with a child? Three hours a day? At what point does any other support service cost too much? Is a one-on-one interpreter for a deaf student too much, even when the student is unable to learn without an interpreter, if the hourly rate for an interpreter is higher than the hourly rate for a teaching aide?

At the least, petitioner is asking to replace a reliable standard -- the distinction between services provided by nurses and services provided by physicians and hospitals -- with an unreliable one that will inevitably generate endless administrative appeals and litigation. Further, the vagueness of the test, and its reliance on cost as a basis for denying services, can be expected to frustrate Congress' express goal of educating children with disabilities with other children in the public schools because the test will encourage school districts

to feel freer to deny needed services, resulting in fewer children with disabilities able to attend school.[14]

The nub of the District's position is a complaint about cost and, in its view, an inadequate level of federal assistance. Pet. Br. at 19. What the District disregards is that the calculus, with respect to the bargain offered by Congress, has been expressly left to the states. 20 U.S.C. § 1400 *et seq*. If the State of Iowa considered the requirements imposed on states by the statute too arduous and the federal assistance offered in return insufficient, which it plainly does not, it would have freed itself of those requirements by disengaging from the federal program.

Petitioner's real complaint is that Iowa has not done so. Indeed, Iowa has enacted legislation that *independently* requires petitioner to supply the disputed services.[15] Furthermore, Iowa is not alone. It is *amici's* understanding that every state has made the choice to participate in the federal program. It may be that these states are balancing not simply the cost of providing nursing services to students with severe disabilities but also the cost of *not* doing so -- the later costs to society and to government coffers of adults with severe disabilities who have been isolated and undereducated. In any event, it is the state's

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[14]Petitioner's reliance on *Tatro*'s discussion that Congress may have wanted to spare schools from an obligation that might prove unduly expensive and beyond the range of their competence is unavailing. As *Tatro* actually held, that goal is served by the Department's distinction between services provided by nurses and services provided by physicians. 468 U.S. at 892. It, therefore, provides no support for rejecting the Department's distinction in favor of petitioner's balancing test.

[15]*See* Pet. App. 58a (Iowa Department of Education ALJ's decision that Iowa law independently requires the necessary school health services to be provided for Garret).

choice, and the local school district's obligation to comply, whatever its policy preferences.

D. Congress' Subsequent Actions

Congress' subsequent actions strongly support the Department's definitions of "related services" and "medical services." The Department's one attempt to alter its definitions of "related services" and "medical services," to exempt school districts from having to provide the types of services Garret needs, was met with such overt hostility from Congress that the proposed regulations were withdrawn. Petitioner does not dispute this. Pet. Br. at 24-25.

In 1982, with a new administration in place, the Secretary of Education proposed issuing regulations that, among other things, would have removed "school health services" from the definition of "related services," and would have excluded, as medical services, "[l]ife-sustaining procedures that . . . [m]ust be administered by specially-trained, licensed health care professionals." *Assistance to States for Education of Handicapped Children, Notice of Proposed Rulemaking*, 47 Fed. Reg. 33,836, 33,838, 33,846 (August 4, 1982). Further, the proposed regulations would have permitted school districts to determine whether to provide services based on the level, frequency, location, and duration of the services required, and the qualifications of the service providers. *Id.* at 33,846.

Congress, as well as the public, reacted so strongly against these proposals that the Secretary quickly withdrew them. Five weeks after the Secretary issued the Notice of Proposed Rulemaking, Congress passed a resolution explaining that it was the sense of Congress that the proposed regulations should not be adopted. *See* section 305(b), Pub. L. No. 97-257, 96 Stat.

874 (September 10, 1982). Two and one-half weeks later, the Secretary withdrew its proposed changes to, among others, the definitions of "related services" and "medical services." *Assistance to States for Education of Handicapped Children, Modification of Notice of Proposed Rulemaking*, 47 Fed. Reg. 49,871, 49,872 (1982) (explaining that the Secretary had withdrawn these proposed changes on September 29, 1982 and no longer intended to adopt them). Less than a year later, Congress took the extraordinary step of restricting the power of the Secretary to alter its regulations in any manner that would lessen the protections provided to children with disabilities that were then available. *See* Pub. L. No. 98-199, § 608(b), 97 Stat. 1359 (1983), codified at 20 U.S.C. § 1407(b).[16] Thus, in 1982 and 1983, Congress enacted legislation to ensure that the agency's regulations limiting the "medical services" exclusion to physician-provided services[17] remained in place.[18]

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[16]The provision prohibits the Secretary from implementing, or publishing in final form, any regulation that "would procedurally or substantively lessen the protections provided to handicapped children [under the statute], as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to . . . least restrictive environment, related services. . .), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation." *Id.*

[17]The Secretary had explained, in its NPRM, that under the existing regulations, the medical services that were excluded were services provided by a licensed physician. 47 Fed. Reg. at 33,838.

[18]Petitioner's claim that Congress failed to take affirmative steps to ensure that nursing services were understood to be required related services ignores this part of the legislative history in which Congress did precisely that. Moreover, petitioner's reliance on Congress' inaction in the face of merely lower court decisions -- when this Court's only decision on the issue, *Tatro*, upheld the Department's regulations and appeared to interpret them to require schools to provide nursing services -- disregards not only sound legislative policy but also sound judicial policy. *See, e.g., Zuber v. Allen*, 396 U.S. 168,

II. THE SERVICES GARRET REQUIRES TO ATTEND SCHOOL ARE NON-MEDICAL RELATED SERVICES STATES MUST PROVIDE.

Garret is precisely the type of child that Congress intended to assist. The services Garret needs can be provided by non-physicians. Nurses or other properly prepared, appropriately trained, and adequately supervised personnel can perform these tasks, which involve assessment, support, monitoring, and health maintenance that merely enable Garret to remain at school and participate in the educational program for the full school day. Garret's needs do not require a physician's services on site while Garret attends school. Thus, the services at issue fall within the statutory provision, as interpreted properly by the agency to which Congress delegated the substantive task of implementing its legislation.

The role of the primary care physician under these circumstances is to coordinate the health care Garret receives, both at home and at school. The overall direction of medical care and health-related services for children with chronic and disabling conditions is the responsibility of the primary care physician and the medical community, wherever the services may be provided, and whoever may provide them.[19] It is

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185-86, n.21 (1969) ("It is at best treacherous to find in [C]ongressional silence alone the adoption of a controlling rule of law.") (quotation and citation omitted).

[19]That physicians may prescribe certain services or that these services are performed under a physician's ultimate supervision does not transform services provided by a nurse or other trained health provider into "medical services" within the meaning of the statute, as this Court found in *Tatro*. *See* 468 U.S. at 893-94 (rejecting just such an argument and noting that school

important that the child's personal physician and the school physician, the school nurse, school administrator and the family develop a written health plan as an integral component of the child's Individual Educational Plan (IEP). Thus, it is the role and responsibility of a child's primary care physician to inform school health professionals about the child's medical needs and child's degree of fragility.

Working with this information, school health professionals (e.g., physicians or nurses) can decide whether the services should be provided by a nurse or delegated to an adequately trained and appropriately supervised health professional. The specific decisions with respect to whether a registered nurse, licensed practical nurse, or other health professional is required for a child must be made on a case-by-case basis and must be redetermined whenever there is a change in the child's condition.

Garret's pediatrician determined that Garret requires the following services to attend school.

1. Clean intermittent catheterization ("CIC"). CIC can be performed by a trained health aide. And it can be performed in a school bathroom or nurse's office, or anywhere the child has privacy. Stephanie Porter, *supra*, at 218. Further, this Court has previously found specifically that CIC is a service schools must provide as a "related service" under the Act. *See Tatro*, 468 U.S. at 895.

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nurses dispense medications or administer emergency injections in accordance with a physician's prescription to children without disabilities and that Congress certainly was not unwilling to guarantee children with disabilities "services of a kind that are routinely provided to the nonhandicapped").

2. Suctioning of the Tracheostomy. When first established, and for the first year or so, a tracheostomy requires careful monitoring and close supervision. This can be done by a licensed practical nurse supervised by a registered nurse or a registered nurse. As the tracheostomy track forms with scar tissue in the neck, the individualized care becomes more routine. Garret's tracheostomy has existed for several years and routine monitoring is sufficient. Suction is needed to clear away secretions or mucus. The attendant must be in sufficiently close physical proximity to see and hear Garret and his equipment.

3. Assisted ventilation by means of an Ambu bag. During suctioning, Garret may need to be given a few breaths through the use of an Ambu bag. In addition, the Ambu bag can be used in an emergency for Cardio Pulmonary Resuscitation ("CPR"). This type of CPR is significantly easier to perform than mouth to mouth resuscitation.

4. Monitoring the ventilator. Like any mechanical device, a ventilator can malfunction. Because Garret needs the ventilator to breathe, a health service provider who has been evaluated and has demonstrated competence in monitoring the machine and its function and responding appropriately when there is a malfunction should be available and close enough to see or hear the ventilator at all times. This can be done by specially trained health personnel; a physician is not required.[20]

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[20]Ventilator-dependent children may also be at risk of autonomic hyper-reflexia. Where the risk is limited, an attendant for such a child should also be able to recognize the signs and call 911 for emergency medical services if needed or, in the appropriate case, perform a clean intermittent catheterization procedure. For children at high risk of autonomic hyper-reflexia, school attendance may be contraindicated. The primary care physician must evaluate the needs of each individual child with disabilities. Garret has apparently never experienced autonomic hyper-reflexia at school, and has not experienced

Amici firmly believe that the above services are not and should not be considered medical services, because none must be provided by a physician and none require on-site supervision by a physician in the school setting. To the contrary, supportive services provided to a student assisted by a ventilator can be performed by a qualified registered nurse, respiratory therapist, or other health professional that has participated in and successfully completed a competency-based training program. *See, e.g.*, Stephanie Porter et al., *supra*, at 308. Moreover, it is not necessary that the same person perform all services.

A registered nurse, for example, would be one appropriate provider of services for Garret. However, depending upon Garret's current condition, these services may be delegated to other personnel. Delegation, of course, should be in accordance with state and local regulations, including state nurse regulations. Here, the Iowa State Board of Nursing has clearly indicated that a registered nurse may delegate the performance of Garret's supportive services to other health professionals. *See* Gov. Lodging (Letter from Lois Churchill, Associate Director, Board of Nursing, to Sue L. Seitz, Counsel of Record for Garret (June 13, 1997)).[21]

Whoever performs these daily services, whether a health professional or a personal attendant, the pediatrician or other primary care physician or supervising nurse must still remain

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this condition at all in recent years. Pet. App. 20a.

[21]The school nurse, in consultation with the child's primary care physician and medical team, should determine the competence required for the delegated personnel and arrange, train and supervise the personnel, and all such activities should be documented. In addition, the parents should be involved and understand and consent to the choices of which personnel are providing which services for their child.

ultimately responsible to evaluate which services need to be performed and how Garret is responding and to ensure that needed services are performed.[22] Delegation therefore requires coordination and collaboration between all individuals involved in Garret's care. However, none of the actual support services Garret needs to attend school with his peers need to be performed by a physician nor do they require a physician to be on the school grounds at the time they are performed.

III. CONGRESS' GOAL OF ENHANCING EDUCATION FOR CHILDREN WITH AND WITHOUT DISABILITIES WILL BE UNDERMINED IF THESE SERVICES ARE DEEMED "MEDICAL SERVICES."

Before the enactment of the IDEA, many children with special needs or life-sustaining equipment were relegated to home tutors or special education centers. Under the statute, however, the school environment has undergone an evolution with increasing numbers of children who, like Garret, are dependent on technology entering the school system. See Wessel et al., *supra*, at 435; Lehr and McDaid, *supra*, at 2, 3; Essex et al., *supra*, at 50. Notwithstanding his paralysis, Garret is not only intelligent and mentally stable but also generally in good health and able to effectively verbally communicate his needs to those around him. He will do much better,

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[22]There is also a critical need for the school authorities and the families of children with severe disabilities mutually to determine precisely when and how responsibility for the child's health will transfer from the family to the school and back to the family, including the circumstances of the transportation between the family home and the school. Similarly, specific intra-school responsibility for ventilatory and other care must be documented to ensure the child's safe transportation between, and participation in, various non-classroom in-school activities. These needs do not appear to be in dispute in this case.

educationally and socially, attending school with other children than remaining at home. His presence is not substantially disruptive to the classroom, and the teacher's time is not unduly burdened by working with him individually.

In addition, Garret's presence in the classroom enables his classmates and teachers to learn of the needs of all children and to observe directly the equitable treatment of those with special needs. The statute not only facilitates education of children with disabilities in the least restrictive environment possible, but also facilitate a different, but equally important, kind of educational exchange to occur, by helping dispel children's fear of disabilities in general. Providing every child with special health needs the opportunity to interact and participate in school activities with peers is an important a part of an appropriate education for all children. See Wessel, *supra*, at 436. Having these supports in place benefits the larger community of the school in its ability to respond to the needs of all students, faculty and staff.

With respect to the impact of the costs of these services, these costs are incurred only if states choose to avail themselves of federal funding through the IDEA. Providing access to public education for children with disabilities, according to standards established by Congress and the Department of Education, is the price Congress exacts for its considerable help in funding special needs education. Moreover, the IDEA does not mandate that the funds for support services for children like Garret come exclusively from school district funds. To the contrary, in 1986 Congress amended the statute to stress the necessity for coordination among different state agencies with respect to implementing the standards specified by the statute. *See* 20 U.S.C. §§ 1412(6), 1413(e). The source of funding for Garret's services can be school funds, federal funding and/or

state health programs (such as Medicaid, Maternal and Child Health programs, etc., which are also significantly supported by federal funding), family resources such as insurance or some combination of the above. *See, e.g.*, 34 C.F.R. § 300.301(a). Thus, the financial impact on the school district can be softened and controlled.

However, when family insurance proceeds are exhausted, states must provide the funding necessary to keep children like Garret in the same public school system that is available free of charge to children without disabilities. Although Congress provides considerable assistance to states willing to undertake these obligations, it left to the states the task of providing additional funds and of determining allocation mechanisms. Thus, whether the additional funding required here must be provided by the Cedar Rapids Community School District, a state agency, or some combination of sources is a choice delegated by Congress to the State of Iowa.

Children with disabilities deserve access to school-based educational services and to a broad range of school activities. The implementation of the IDEA has markedly improved the availability and use of related health services in schools to assist children with disabilities. To deprive Garret of this opportunity simply because his related services require more attention from qualified health care professionals than the services required by other children with disabilities would directly undermine the intent of Congress to include children with disabilities in the nation's public schools. It would run counter to the extensive progress that has been made in providing access for children with disabilities to an educational program in the least restrictive setting possible in the public school system. If the support services Garret needs to obtain access to public education are classified as "medical services" outside the statute's definition

of related services that must be provided, it will leave Garret with no choice but to be educated at home -- precisely the result Congress intended to prevent whenever possible.

CONCLUSION

For the above reasons, *amici* urge the Court to affirm.

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In the
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October Term, 1997

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,
Petitioner

v.

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Respondent

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

Both parties have consented to the filing of this brief.[1]

Consents are on file with the Clerk.

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[1] This brief was written by National School Boards Association (NSBA) who is *amicus curiae* before this Court and not in any part by counsel for either party. No person or entity other than NSBA has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE CASE

When the Respondent, Garret F., was four years old, he was involved in a motorcycle accident and suffered a spinal cord injury. Although his mental abilities were unaffected, he was left quadriplegic and ventilator dependent. Garret has required a personal attendant within hearing distance of him at all times to provide for his health care needs. From kindergarten through fourth grade, Garret's parents provided a nurse to attend to his medical needs while in school. Garret's daily health needs while in school include urinary bladder catheterization about once a day, suctioning his tracheostomy as needed, providing food and drink on a regular schedule, repositioning, and ambu bag administration if the ventilator malfunctions. In addition, the nurse is responsible for ventilator settings checks, blood pressure monitoring, and bowel disimpactation in cases of autonomic hyperreflexia. When Garret began fifth grade, the parents requested that the school district provide the nursing services while he was attending school. The school district refused to provide the services on the grounds it

was not obligated to provide continuous one-on-one nursing services. The parents brought an administrative action based on the Individuals with Disabilities Education Act (IDEA) and Iowa's special education laws. An administrative law judge ruled that the school district was required to provide the nursing services. The school district appealed to the U.S. district court. The district court granted summary judgment for the parents on the grounds that the services provided to Garret are "related services" which the school district is required to provide under IDEA, rather than excluded "medical services."

The school district appealed to the Eighth Circuit, arguing that the nursing services provided to Garret are medical services, not for either diagnostic or evaluation purposes, and, therefore, excluded from coverage under IDEA. The court of appeals panel affirmed the district court's decision, holding that the nursing services provided to Garret are related services within the meaning of IDEA. The court stated that the issue of whether the services are related or medical is controlled by *Irving Independent School*

District v. Tatro, 468 U.S. 883 (1984). The court held that the services provided to Garret are related services, not medical services, because the services could be provided by a nurse or layperson. It read *Tatro* as requiring a court to find supportive services are related services unless the services are of the kind that only a physician can provide.

SUMMARY OF THE ARGUMENT

In addition to the special education and related services Cedar Rapids provides, Garret is seeking the district provide, at its expense, extensive medical services to suit his special needs. Specifically, he needs a nurse in his vicinity at all times to provide him with: urinary bladder catheterization once a day; care for, suctioning and changing his tracheotomy tube; ventilator management (manually pumping an air bag attached to his tracheotomy tube when the ventilator is blocked (ambu bagging)), and attending to the ventilator in the event of a malfunction or an electrical problem; recognition of, and emergency procedures in the event he experiences autonomic hyperflexia. Garret is

ventilator dependent and requires constant assessment and monitoring. Without this assistance Garret could suffer respiratory distress and be in a life-threatening medical condition.

Amicus agrees with Petitioner that this service is beyond the scope of the IDEA as a "medical service" even though it is not required to be performed by a physician. It is a constant, complex and urgent service which is beyond the scope of "school health services". Schools lack adequate human and financial resources to fulfill a mandate for health services that transcends their traditional educational mission.

INTEREST OF *AMICUS*

National School Boards Association (NSBA), is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 97,000 school board members, who, in turn, govern the over 15,000 local school districts that serve more than

40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation.

Each of the school districts in this nation receives or is eligible to receive federal financial assistance under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* Because recipients of federal funds under the IDEA are obligated to comply with certain conditions specified in the Act and its accompanying regulations, the subject of this case raises issues of great importance to school districts across the country.

ISSUE PRESENTED FOR REVIEW

Whether a school district is required to pay for continuous, complex, life sustaining, one-on-one nursing services for a disabled student under the Individuals with Disabilities Education Act.

I. INTRODUCTION

In 1975, Congress enacted the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 775 (1975) (codified with subsequent amendments at 20 U.S.C. §§ 1401-1485 (1994) ("EAHCA"), with the laudable goal of

assuring that every disabled child will receive "special education and related services" at public expense. In 1990, Congress amended the EAHCA and renamed it the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"). Congress amended and reauthorized the statute again in 1997. The IDEA requires states, as a condition of receiving federal special education funds, to ensure that schools provide a free appropriate public education to all eligible children with disabilities. 20 U.S.C. § 1412(2); 34 C.F.R. §§ 300.121, 300.1. In addition to providing special education and related services, states must also ensure that all eligible children, to the maximum extent possible, are being educated with non-disabled students in the least restrictive environment.

If a child is eligible for IDEA services, a school must provide special education and, if necessary, related services to meet his/her unique needs. 34 C.F.R. § 300.17(a)(1). Special education includes instruction conducted in the classroom, at home, in hospitals and institutions, or in other settings, and it may include

instruction in physical education. 20 U.S.C. § 1401(a)(16)(A)-(B).

II. USE OF A STANDARD TO INTERPRET THE MEDICAL SERVICES EXCLUSION THAT FOCUSES ON THE INDIVIDUAL CASE AND CONSIDERS THE CONSTANCY, COMPLEXITY AND CRITICAL NEED FOR SERVICES IS CONSISTENT WITH STATUTORY AND REGULATORY LANGUAGE, THIS COURT'S DECISIONS, AGENCY INTERPRETATION AND THE APPROACH OF THE MAJORITY OF COURTS THAT HAVE ADDRESSED THIS ISSUE.

A. The statute and regulations do not provide clear guidance on the scope of the medical services exclusion.

One of the most controversial and possibly most expensive aspects of the IDEA is the related services mandate. The statutory definition of related services is:

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(a)(17).

The regulations do little more than list additional examples of possible services, e.g., "school health services, social work services in schools, and parent counseling and training." 34 C.F.R. § 300.16(a). Not intended to be exhaustive, this listing is meant to provide examples of possible services. As stated in the comments to the regulations:

> The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a child with a disability to benefit from special education.

34 C.F.R. § 300.16, Note.

Recent amendments have added specific services to this list: assistive technology devices and services,[2] 20 U.S.C. §

[2] The regulations, 34 C.F.R. § 300.5, and the statute, 20 U.S.C. § 1401(a)(25), define assistive technology device as "any item, piece of equipment or product system whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of children with disabilities." *See* Elena Gallegos, *The Impact of Assistive Technology Devices on Special Education, Related Services and Program Modifications*, in SCHOOL LAW IN REVIEW 7-1 (NSBA 1995), for a more detailed discussion of this topic.

1401(a)(25), (26), and transition services,[3] 20 U.S.C. § 1401(a)(19), to the statute. In 1997 Congress amended the IDEA related services definition to include orientation and mobility services. Pub. L. 105-17, Title I, § 602, 111 Stat. 42, to be codified at 20 U.S.C.§ 1401(a)(22). In none of these instances has it changed or clarified the original exclusionary language which limits medical services owed to children served under the IDEA to those necessary for evaluation and diagnostic purposes.

The definition of medical services is the focus of this case. The regulations specifically list "school health services" and "medical services for diagnostic or evaluation purposes" in the examples of related services. 34 C.F.R. § 300.16(a) "School health services" are defined as "services provided by a qualified school nurse or other qualified person." 34 C.F.R. § 300.16(b)(11) "Medical services" are defined as "services provided by a licensed

[3] Transition service includes "post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation." 20 U.S.C. § 1401(a)(19).

physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. § 300.16(b)(4). Thus, neither the statute nor the regulations define excluded medical services.

Related services, thus, cover a myriad of support services, [4] as determined to be necessary for a student with disabilities to benefit from special education. Only medical services and individually prescribed equipment are excluded.

B. This Court's decision in *Tatro* does not compel use of the bright line physician/non-physician standard.

This Court in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), devised a three-part test to determine whether

[4] Note also that the components of room and board plus transportation to and from a residential placement can also be considered a "related service." As put by one court, "That residential placement as sought by Douglas and Christopher may be available as a 'related service' under the Act is indisputable; . . . if residential placement is necessary in order for Douglas and Christopher to receive any educational benefits from special education, then under the EHA, the District must pay for the cost of that placement." *Christopher T. v. San Francisco Unified School Dist.*, 553 F. Supp. 1107 (N.D. Cal. 1982).

a school district is required to provide a particular service to a student as a related service: (1) the child must be "handicapped" so as to require special education; (2) the service must be necessary for the child to benefit from his or her special education; and (3) the service cannot be specifically excluded, i.e., medical or individually prescribed equipment.

Applying this three part test, this Court in *Tatro* found clean intermittent catheterization (CIC) to be a related service, not within the "medical service" exclusion. It promised this conclusion on the fact that "CIC is analogous to the type of service that school nurses have traditionally provided to students." *Tatro,* 468 U.S. at 893 – 94.

While one could conclude that Congress wanted "to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence...," *Tatro,* 468 U.S. at 892 - 93, it was also logical to conclude that "Congress intended to impose the obligation to provide school nursing services." *Id.* This Court did state that

services which must be provided by a physician are necessarily medical services. However, it did not necessarily limit medical services to only those provided by a physician and thus left the door open for consideration of other factors in making that determination. *Id.* at 894. This distinction was drawn by the Ninth Circuit: "The Court held only that services which must be provided by a licensed physician, other than those which are diagnostic or evaluative, are excluded and that school nursing services of a simple nature are not excluded." *Clovis Unified School Dist. v. California Office of Admin. Hearings*, 903 F.2d 635 (9th Cir. 1990).

C. The majority of courts addressing this issue have used a multi-factor analysis.

Several other courts have had to address services of a more complex nature than those at issue in *Tatro*. In these cases courts , based on the concerns expressed by this Court in *Tatro*, have crafted a definition of an excluded medical service by examining the complexity, frequency, and emergency nature of the services

provided. *E.g., Detsel v. Board of Educ. of Auburn*, 820 F.2d 587 (2d Cir.), *cert. denied*, 484 U.S. 981 (1987); *Granite School District v. Shannon M.*, 787 F. Supp. 1020 (D. Utah 1992); *Macomb County Intermediate School District v. Joshua S.*, 715 F. Supp. 824 (E.D. Mich. 1989); *Bevin H. v. Wright*, 666 F. Supp. 71 (W.D. Pa. 1987).

In *Detsel v. Board of Educ. of Auburn Enlarged City School Dist.*, 820 F.2d 587 (2d Cir. 1986), *cert. denied*, 484 U.S. 981 (1987), the court held that constant respiratory assistance was a "medical service" and thus not required from the school district. In *Clovis Unified School Dist. v. California Office of Admin. Hearings*, 903 F.2d 635 (9th Cir. 1990), the Ninth Circuit Court of Appeals held that an emotionally disturbed students' temporary hospitalization was a "medical service" and thus not the responsibility of the school district. In *Neely v. Rutherford County School*, 68 F.3d 965 (6th Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996), the court rejected the argument that constant respirator care for a student was a related service under IDEA. These

decisions are consistent with other lower court decisions and state rulings. *E.g., Fulginiti v. Roxbury Tp. Public Schools*, 921 F. Supp. 1320 (D.N.J. 1996), *aff'd*, 116 F.3d 468 (3rd Cir. 1997); *Ellison v. Board of Educ. of Three Village Central School Dist.*, 597 N.Y.S.2d 483 (App. Div. 1993); *Granite School Dist. v. Shannon M.*, 787 F.Supp. 1020 (D. Utah 1992); *Spencerport Central School Dist.*, 16 EHLR 1042 (N.Y. Comm'r Educ. 1990); *Glen Rock Board of Educ.* 16 EHLR 1102 (N.J. Admin L.J. 1990). *Contra Macomb County Intermediate School Dist. v. Joshua S.*, 715 F.Supp. 824 (E.D. Mich. 1989); *Morton Community Unit School Dist. No. 709 v. J.M.*, 986 F. Supp. 1112 (C.D. Ill. 1997); *Skelly v. Brookfield LaGrange Park School Dist.*, 968 F. Supp. 385 (N.D. Ill. 1997).

D. Interpretive letters from the Department of Education support individualized determinations based on a multi-factor analysis to resolve the medical services exclusion issue.

The Department of Education has addressed the issue as well, in responses to inquiries. Continuing the policy of the statute to make individualized determinations of a student's needs the Department stated:

> A threshold issue raised by your inquiry is whether "one-to-one nursing services" to enable a disabled student to attend school would be considered an eligible "school health service", or an excluded "medical service" because the services are for purposes other than those that are "diagnostic and evaluative in nature." 34 C.F.R. 300.16(b)(4) and (b)(11). Courts that have addressed this issue have reached differing conclusions based on factors such as the nature and intensity of the nursing services required for a particular student and the level of skill required of the individual performing the services. If the care required is intermittent and could be provided by a regular school nurse, courts have generally held that the service is an eligible related service. . . . However, if the care required is continuous, courts relying on the private duty aspect of the services, generally have held that the service is an excluded medical service. [citations omitted]

Hehir Letter to Anderson, 211 EHLR 392 (June 24, 1986).

Use of a standard which focuses on the individual case and takes into consideration the constancy, complexity and critical need

for the services is not in violation of this Court's ruling in *Tatro* and would be consistent with the interpretation of the statute, the agency and a majority of the courts who have addressed this issue. Applying such a standard this Court could find that the constant, complex, critical medical care of the student in this case is an excluded medical services despite the fact that it does not have to be performed by a physician. As Petitioner's brief clearly demonstrates, case law and regulations in other contexts support the notion that medical services are not limited to those which must be performed by a physician.

III. SCHOOLS CURRENTLY LACK ADEQUATE SCHOOL NURSING SERVICES AND THE FINANCIAL RESOURCES TO EMPLOY THE ADDITIONAL HEALTH PROFESSIONALS NECESSARY TO FULFILL THE LOWER COURT'S INTERPRETATION OF THE MEDICAL SERVICES EXCLUSION.

The question of who must provide health related services often raises concerns. It is not clear that the statute and regulations would base the mandate of services totally on the title of the individual service provider. A comment to the regulations states:

> There are certain kinds of services that might be provided

> by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors; and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

34 C.F.R. § 300.16 Note.

In *Tatro* this Court indicated that school districts should not have to provide services that are "beyond the range of their competence" and have never been "part of the educational system." *Tatro*, 468 U.S. at 892 - 93.[5]

Cedar Rapids is a moderately large district with about 18,000 students, and might be able to muster the financial and human resources to undertake the lower court's mandate. It must be noted that it is not a "typical" school district. Eighty-eight percent of the 15,000 school districts in this country have less than 5,000 students, and 30% have less than 500 students. U. S.

[5] A broader question relevant to this case was raised during oral arguments in *Tatro* : "Well my question really is will the school have to employ somebody that they ordinarily wouldn't employ in order to carry out this procedure?" question from Justice White, Trans. of Oral Argument, p. 20, lines 2-4. "Well, if there were a school nurse in the building, that would solve the problem wouldn't it?" *Id.* at p. 23 l. 7 -9.

Department of Education, National Center for Education Statistics, *Common Core of Data, 1995-96.* These small school districts also fall under the mandate of this Court. They typically lack the specialized staff and resources to perform complex constant health services. Additionally, because of the economies of scale, costs in smaller districts will generally be even higher than those faced by larger districts such as Cedar Rapids.

The array of services currently provided by school nurses been set forth in the literature. See table below:

School Health Services

Administration of first aid
Administration of medication
Alcohol/drug screening
Formal cardiovascular screenings
Child abuse evaluation and follow-up
Prenatal testing
Health risk appraisal
Development of health component of IEP
Development of health component of IFSP
Evaluation for emotional/behavioral problems
Dental services
Tube feedings
Irrigations
Monitoring vital signs
Clean dressing changes
Sterile dressing changes
Collection/testing of blood samples
Administration or monitoring oxygen
Urinary catheterization
Physical exams
Processing Workmen's Compensation claims
School-based alcohol/drug treatment
Case management for chronic health problems
Complex nursing care to students with special health needs
Employee wellness programs
Annual physical exams and other primary health care services
Family counseling
Immunizations at school
Mental health counseling
Nutrition counseling
Physical fitness screenings
Screening (height, weight, vision, hearing)
Obtaining throat cultures

66 *Journal of School Health* 55, 57 (February 1996).

This listing should not be construed as an itemization of the services traditionally or typically provided by school nurses. While some of them, such as administration of basic first aid and medication, are common services routinely provided by school nurses, others reflect the increasing responsibilities being foisted upon schools to cope with the health needs of children to an extent that far outstrips the historic educational mission of schools.

Most school districts do not currently employ enough school nurses with sufficient expertise to provide complex constant medical services, nor do most have the resources to employ full-time school nurses assigned to only one school, much less one student. In fact it is most common for a district to employ a few nurses who are shared among a number of buildings.

In 1994, approximately 31,000 school nurses were employed within the over 15,000 public school districts nationwide. On the average, the national ratio of school nurses to students is 1:3,098 with the lowest average ratio in New Hampshire (1:486) and the highest in Tennessee (1:10,814). Nat'l

Assoc. of School Nurses, *National Survey of School Nurses* (1995). Unfortunately these data indicate that "the states with the fewest nurses in schools are frequently also struggling to cope with thte highest rates of poverty and growing student health needs." Annie E. Casey Foundation, *Kids Count* (1994).

This is compounded by the fact that not all school nurses would be able to perform the tasks required. The *Journal of School Health* reported in a survey of school districts, mostly with larger enrollments, that 91% employ some type of nursing staff. Most of these districts employ registered nurses, however, 36% of these districts indicated that the R.N. was the coordinator of the school health program. Thus, even if there were an R.N. on staff, that individual would not necessarily be available to provide direct services to students -- let alone constant services for one student. Further, 30.7% of the districts report using health assistants, with only 9.6% of these being certified health assistants. 66 *Journal of School Health*, at 57. Clearly, schools could not rely on the current work force employed to provide the constant, complex nursing

services at issue in this case, nor the full range of services that would be mandated by the lower court's bright line standard.

When one considers the full range of complex medical services which schools may be forced to provide if the Eighth's Circuit's ruling is upheld, the costs become overwhelming. Further, it is not just the direct costs providing the related services, but also the indirect burdens that attend them which concern school districts. Liability insurance and related needs cause costs to build further. This would be inconsistent with this Court's finding that Congress did not impose "a burden of unspecified proportions and weight" when it enacted IDEA. *Tatro,* 458 U.S. at 190 n.11

To provide a wide range of medical services, other programs -- direct educational programs – may be sacrificed. If so, the original intent of IDEA, to provide an education for children with disabilities, may ultimately suffer. As discussed by Petitioner, congressional intent is clear that local school board resources were intended to focus on educational costs and other governmental agencies were not relieved of their responsibility to provide

medical services.[6]

IV. SCHOOL DISTRICT BUDGETS CANNOT SHOULDER THE ADDITIONAL FINANCIAL STRAIN THAT THE LOWER COURT'S DECISION WOULD IMPOSE GIVEN THE ALREADY BURDENSOME COST OF SPECIAL EDUCATION

The court of appeals grossly misinterpreted the Individuals with Disabilities Education Act. If this ruling is allowed to stand, it will impose on school district who have met their obligations under the IDEA a substantial financial burden not contemplated by Congress and one that they can ill afford given the already tremendous costs of special education.

The obligation under the IDEA to educate children with disabilities is an enormously expensive proposition paid for primarily with state and local tax dollars. Since its original enactment, the costs have continually grown, more than doubling in one decade. In 1982, special education expenditures were

[6] Congress specifically stated that "medical services" were the responsibility of other governmental agencies:

> Nothing in this title permits a State to reduce medical and other assistance available, or to alter eligibility, under Titles V and XIX of the Social Security Act with respect to the provision of a free appropriate public education for children with disabilities in the State.

$11.75 billion. In the 1992–93 school year, these costs rose to more than $24.25 billion. U.S. Department of Education, *16th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*. In the 1993-94 school year, special education costs continued to rise to more than $32 billion. T. Parrish, *Special Education Finance Past, Present and Future* (Center for Special Education Finance, 1996).

Local school boards have struggled to meet these rising costs. One report estimates that between 1967 and 1991 the percentage of school spending on regular education declined from 80% to 59% of total education dollars, while the percentage spent on special education during that time frame increase from 4% to 17%. Of net new money spent on education in 1991, regular education received 26% in contrast to 38% expended for special education. Rothstein, R. & K. Miles, *Where's the Money Gone? Changes in the Level and Composition of Education Spending* 7-8 (Economic Policy Institute 1995). This escalation has caused grave

20 U.S.C. §1412(e).

problems for public education. We, in a sense, have been forced "to rob Peter to pay Paul."

The differences between average per pupil expenditures in regular and special education is staggering. Average per pupil spending in the U.S. for 1994 was $5,325; and $5,483 in Iowa. National Center for Educational Statistics, *Common Core of Data* (1997). It is generally calculated that spending on special education is 2.28 times the spending on regular education. Center for Special Education, *What Are We Spending on Special Education in the U.S.* (Feb. 1998). This would bring the national average expenditure on special education during that year to $12,141 per pupil and Iowa's to $12,501. Here, Respondents are requesting that the school district assume an additional expense of $20,000 to $30,000 annually on this child alone. Pet. App. 53a.

In enacting the IDEA, Congress recognized the limited financial resources available to state and local education agencies to develop programs for children with disabilities. When IDEA was passed in 1975, Congress made a commitment to provide

states with 40% of the national average per pupil expenditure for each eligible child to be used to defray the "excess cost" associated with meeting the educational needs of children with disabilities.

Unfortunately, Congress has never even come close to meeting that promise. Funding for the program has never exceeded 12% of the national average per pupil expenditure. U.S. Department of Education, *Justification of Appropriations Estimate to the Congress Fiscal Year 1993* (1992). In fact, as can be seen from the table below, the federal share of special education costs has been declining while the local school district share has grown. This percentage of burden is compounded by the increased costs noted above.

FEDERAL, STATE AND LOCAL SHARES OF SPECIAL EDUCATION SPENDING

	Federal Share	State Share	Local Share
1982-83 School Year	8.3%	53.8%	37.9%
1987-88 School Year	7.8%	56.0%	36.2%
1993-94 School Year	7.1%	44.0%	49.0%

Sources: The 1982-83 data are from the U.S. Department of Education, Office of Special Education Programs Data Analysis

System (DANS). The 1993-94 data are from the CSEF Survey on State Special Education Funding System, 1994-95, and the Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act. *Center for Special Education Finance, http://csef.air.org/faq3-4.html*

In light of the congressional failure to provide the state and local education agencies with adequate financial assistance to pay for the costs of special education, any judicial interpretations of the IDEA which inflicts additional obligations to pay for additional services fall inordinately upon already overburdened local public education budgets. Upholding the court of appeals decision would result in the siphoning of funds from school systems which have already provided appropriate programs, thereby causing an unjustifiable drain on an already limited amount of funds.

CONCLUSION

For the reasons stated above, Amicus respectfully requests this Court to reverse the decision of the Eighth Circuit Court of Appeals and adopt the multi-factored analysis (considering the nature, extent, complexity, urgency and burdensome nature of the medical tasks at issue) consistent with the Second, Fourth, Sixth, and Ninth Circuit Courts of Appeals.

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